CLERK'S COPY.

No appearance for respondent

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

vs.

E. W. THOMPSON

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, LOS ANGELES COUNTY, STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JANUARY 8, 1941.

CERTIORARI GRANTED FEBRUARY 17, 1941.

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SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

vs.

E. W. THOMPSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

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[fol. 1]

IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

E. W. THOMPSON, Defendant

COMPLAINT—Filed August 28, 1939

Personally appeared before me, this 28th day of August, 1939, Mrs. George Farley of Los Angeles City, who, first being duly sworn, complains and says: That on or about the 22nd day of July, 1939, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Sec. 3, of Chap. 390 of the Statutes of 1933, was committed by E. W. Thompson (Whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully engage in the business and act in the capacity of a motor transportation agent without then and there having a license from the Railroad Commission of the State of California so to do.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant (whose true name to affiant is unknown) and that he may be dealt with according to law.

[fol. 2] Mrs. George Farley.

Subscribed and sworn to before me this 28th day of August, 1939. Urban F. Emme, Clerk of the Municipal Court of Los Angeles City, in said County and State. By E. L. Worrel, Deputy Clerk. (Seal.)

(Form—Sec. 3, Chap. 390, Stats. '33.)
Warrant Issued.

[File endorsement omitted.]

Issued by Ray L. Chesebro, City Attorney, by Wm. J. Lane, Deputy City Attorney.
CR A 1692.

[fol. 3] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed November 16, 1939

To the Plaintiff Above Named and to Ray Chesebro, its Attorney:

You and Each of You Will Please Take Notice, That the above named defendant E. W. Thompson is hereby appealed from that final judgment of conviction in the above entitled action and from that order, denying a motion of new trial in the above entitled action which said final judgment and said order were made on the 30th day of October and the 3rd day of November, 1939, in division 8 in the above entitled court.

That said appeal be based upon the following grounds to-wit:

(1) That the judgment of the court is contrary to the law and the evidence.

(2) That the court has erred in its decision on question of law arising during the course of the trial.

[fol. 4] (3) That the notice is based upon the records and files of the above entitled action.

Los Angeles, California. Dated 16 day of November, 1939.

Wyman G. Reynolds, Attorney for Defendant.

Defendant released C. R. pending appeal.

Walters, Judge.

[File endorsement omitted.]

[fol. 5] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

COURT'S CORRECTED STATEMENT ON APPEAL—Filed March 19, 1940

Be it Remembered that the above entitled cause came on regularly for trial on the 11th day of September, 1939, in

Division 7 of the above entitled court, the Honorable Byron J. Walters, judge presiding, the People being represented by David M. Hoffman, Deputy City Attorney of the City of Los Angeles, and the defendant being personally present in court and represented by Wyman G. Reynolds, Esq. The defendant was charged with violation of Section 3 of Chapter 390 of the Statutes of 1933 as more fully set forth in the complaint on file herein, and a trial by jury having been waived by the defendant in person and by defendant's counsel and by the People, the following proceedings were had.

MRS. GENE FARLEY, called as a witness for the plaintiff, was first duly sworn and testified in substance as follows:

That on or about the 22nd day of July, 1939, she resided at 527 Rampart Avenue, in the City of Los Angeles, and that on such day, she visited an address located and known [fol. 6] as 718 West Sixth Street in the City of Los Angeles, which such address was known as the Coast-to-Coast Travel Bureau; that she visited such address between eleven and twelve o'clock A. M. of said day, and at that place saw the defendant E. W. Thompson.

That the witness went to such address with her sister, Mrs. George Farley, and the defendant E. W. Thompson asked her if she was the girl going to the City of Dallas, in the State of Texas, to which she replied that she and her sister were both going. That at the time and place, she gave to the defendant, the sum of Twenty-two Dollars ($22.00) and the defendant gave to her and her sister a receipt for such money for transportation from the City of Los Angeles, State of California, to the City of Dallas, State of Texas. Also at such time, the defendant did advise her that he had a car going out right away and that it was a Ford Sedan automobile. That at the time she gave him the money, he did not give her a ticket, or her sister a ticket but only gave them a receipt. That after she and her sister waited at the office for quite some time, a car drove up which was a Ford Sedan automobile and she and her sister got into the car and their baggage was put into the car. That there were five (5) people in the car including the driver; that arrangement for her transportation such as the quotation of the price of the fare had been given her at another place by a person named Roy Mills at the Traveler's Hotel.

[fol. 7] That after she and her sister got into the automobile, the defendant took the receipts which he had previously given her and her sister.

BELL ALDRIDGE, a witness being called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That she resided at 2203 East Second Street, in the City of Los Angeles, and that on or about the 22nd day of July, 1939, she visited an address known as 718 West Sixth Street, in the City of Los Angeles; that she went to such address with her daughter Mrs. Edna O'dell; that she there saw a place of business known as the Coast-to-Coast Travel Bureau; that she arrived there with her daughter about 11:30 A. M. of said day and saw the defendant E. W. Thompson. She did not talk much with the defendant Thompson, having previously talked with Mr. Mills of the Traveler's Hotel.

Mr. Thompson, the defendant asked if she was the person who made the reservation to go to Dallas, Texas. She told the defendant that she was and she then paid the defendant Eleven Dollars ($11.00) for her fare from the City of Los Angeles, State of California, to the City of Dallas, State of Texas. That the defendant, Thompson, made and delivered to her a receipt for said Eleven Dollars ($11.00); that she also signed a list that had the other names on it, which list on cross examination was exhibited to her and which she identified as being the list which she signed and [fol. 8] which was offered and received in evidence as defendant's Exhibit 1, which is by reference, made a part hereof.

That she got into a 1937 Ford Sedan automobile; that there were five (5) persons including the driver in said car; that she had made arrangements and reservations for her trip with another person not having discussed it with the defendant Thompson. That the person she discussed such transportation with was some man at the Traveler's Hotel and that thereafter a car had picked them up and taken the witness and her daughter to the Coast-to-Coast Travel Bureau, the place of business of this defendant.

That this witness was exhibited a photograph of the defendant's place of business which by stipulation of counsel was stipulated to be a true and fair representation of the

exterior of defendant's place of business located at 718 West Sixth Street, in the City of Los Angeles, and which photograph was then offered and received in evidence as people's Exhibit A.

MRS. EDNA O'DELL, a witness called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That all reservations or arrangements for her trip to the City of Dallas, State of Texas, was made across the street from the defendant's place of business at a place known as the Traveler's Hotel; that she is the daughter of the last [fol. 9] witness, Mrs. Bell Aldridge; that she and her mother were going to the City of Dallas, State of Texas; that the witness did not at any time talk to the defendant E. W. Thompson, but that the witness gave her money to her mother and she observed her mother give the money for her fare to the defendant E. W. Thompson, and she observed the defendant give her mother a receipt for such money; that she gave her mother Eleven Dollars ($11.00) for her fare.

MR. MCCLURE, a witness called on behalf of the prosecution, and after being first duly sworn, testified in substance as follows:

That he had been working for the Standard Stations Incorporated for some months and that he owned a 1937 Ford Sedan automobile in good mechanical condition; that he talked to the daughter and wife of the defendant E. W. Thompson and later saw the defendant E. W. Thompson himself; that the first time he saw the defendant E. W. Thompson, was the day before he left for the City of Dallas, State of Texas, to-wit, on or about the 21st day of July, 1939; that he the witness was going himself on his own business to the City of San Antonio, State of Texas, and wanted to take some passengers with him to pay part of the expenses of the trip; that the defendant Thompson told him to come down to his place of business the next morning; that the witness did that and some time between elevene and twelve o'clock on or about the 22nd day of July, he saw the [fol. 10] defendant who stated to him that he had four (4)

women passengers for the witness to take to Dallas, Texas with him, and that his, the defendant's fee for securing each passenger was the sum of four dollars ($4.00) per passenger, at which time the defendant gave the witness seven dollars ($7.00) for each passenger, or a total of twenty-eight dollars ($28.00). That the witness then gave the defendant a receipt and signed a statement, which statement was then offered in evidence by the defendant, was received by the court and marked Defendant's Exhibit 1. The witness then further testified that the four (4) women passengers, Mrs. Gene Farley, Mrs. George Farley, Mrs. Edna O'Dell and Belle Aldridge, got into his automobile and their luggage was put into his automobile. That he planned to go first from the City of Los Angeles, State of California to the City of Dallas, State of Texas, with his four (4) passengers, and then continue to the City of San Antonio, State of Texas on his own business. That he had never before transported any passengers for compensation. The prosecution then rested.

The defendant moved to dismiss the action in proceeding on the ground that a primi facie case had not been established and there was insufficient evidence to support the charge which motion was by the court denied.

The defendant E. W. THOMPSON, was then called as a witness on his own behalf and after being first duly sworn, testified in substance as follows:

[fol. 11] That he received a call from Mr. Mills of the Traveler's Hotel and was advised that he had some passengers to go to the State of Texas, and that Mills had no car available and at that time, the defendant E. W. Thompson advised him that he did have a car available.

That the defendant was the sole owner of the Coast-to-Coast Travel Bureau and had been engaged in such business for approximately sixteen years. That on the date alleged in the complaint, to-wit, the 22nd day of July, 1939, he did not have a license from the Railroad Commission as prescribed by the statute here involved. That prior to 1931 he had had a license from the State Railroad Commission of the State of California. The witness was then asked if he had been advised not to secure a license, to which an

objection was made by the prosecution that the question was incompetent, irrelevant and immaterial, on the grounds that it did not tend to prove or disprove any of the issues before the court at this time. Prior to the ruling upon the objection by the court offer of proof was made on behalf of the defendant, E. W. Thompson, by his counsel, which offer of proof was in substance as follows:

That prior to 1931 the defendant had had a license from the State Railroad Commission of the State of California. That in 1931 he had applied for a license, after the law had been changed, and he had forwarded to the Railroad Commission his application, together with his check for such [fol. 12] license and in reply thereto he was advised by letter from the Commission that they were not issuing permits or license for his type of business, and that when they deemed it necessary for him to have a license they would advise him to that effect. That the objection made by the prosecution as above stated, as well as a like objection made by the People to the offer of proof, was sustained by the court. The defendant then further testified in substance that he had a pick up car and that he sent the pick up car to pick up these four (4) women and that they were going to the City of Dallas, State of Texas, but that they had been booked and the price had been agreed upon by Mr. Mills of the Traveler's Hotel.

That in all, he received Fourty-four Dollars ($44.00) from the four (4) passengers of which he gave Twenty-eight Dollars ($28.00) to the witness McClure, gave Twelve Dollars ($12.00) to Mr. Mills of the Traveler's Hotel, and retained Four Dollars ($4.00) for himself or One Dollar ($1.00) per passenger for having secured the car and attended to picking up the passengers and loading the car. That he had talked with the witness McClure on the 21st day of July, 1939, at which time he made an agreement with Mr. McClure to secure passengers for him to pay the expenses on the trip to Dallas, Texas. That he had told Mr. McClure that his commission fee for securing each passenger would be four dollars ($4.00) per passenger, and [fol. 13] that the balance of seven dollars ($7.00) for each passenger was to be paid to Mr. McClure by him.

That thereupon, the defendant rested and the court continued the cause until the 24th day of October, 1939, for the purpose of argument. That thereafter, the cause was con-

tinued from time to time by stipulation of counsel and written memorandum of authorities were submitted to the trial court, and thereafter, on the 30th day of October, 1939, the court after rendering its opinion found the defendant guilty as charged and thereafter, continued the imposition of sentence until the 3rd day of November, 1939. That on said day, defendant did make a motion for a new trial on all of the grounds as set forth in Section 1181 of the Penal Code, and in particular on the ground that the verdict is contrary to the law and the evidence and that the court erred in the decision of question of law arising during the course of trial, which said motion for a new trial was submitted to the court and was by the court denied, that thereafter, an application for probation was made by the defendant, which application was granted by the court and the matter set down for hearing on such application to the 16th day of November, 1939, at which time there being no legal cause why the sentence should not be pronounced, the court did sentence the defendant to pay a fine of Two Hundred Fifty Dollars ($250.00) or serve fifty (50) days in jail, which said sentence was suspended and the defendant placed [fol. 14] upon probation for a period of one (1) year on condition that the defendant conform with all of the rules and regulations of the probation office and that the defendant not engage in such like or similar business during such probationary term.

That thereafter, the defendant did give written notice of appeal and did appeal from the final judgment of conviction in the above entitled action and from that order denying a motion for a new trial in the above entitled action as hereinabove noted, on *on* the following grounds:

That the judgment of the court is contrary to the law and the evidence;

That the court has erred in its decisions on questions of law arising during the course of the trial;

That this appeal is based upon this Statement of Appeal and upon the Exhibits therein noted being People's Exhibit A, and defendant's Exhibit 1, and upon all the records and files in the above entitled action.

Wyman G. Reynolds, Attorney for Defendant and Ap-ellant.

The court does hereby settle and allow the foregoing Statement of Appeal and certifies that the same is a true and correct statement of the proceedings had in the above [fol. 15] entitled action.

Dated: 19 day of March, 1940, Los Angeles, California.

Byron J. Walters, Judge of the Municipal Court.

Received copy of the within statement this 19 day of March, 1940. David M. Hoffman, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 16] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

CR A 1692

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant

APPELLANT'S POINTS AND AUTHORITIES—Filed March 28, 1940

Comes Now the appellant, above named, and respectfully files for the consideration of the above entitled court the following points and authorities, to-wit:

I

There is no evidence to show or establish that the defendant acted as a motor carrier transportation agent in that the evidence entirely fails to disclose that the defendant at any time in any capacity sold, offered for sale or negotiated for any transportation to be furnished by a motor carrier but the contrary affirmatively appears from the record in this case.

Statute 1933 Cha ter 390 as amended by Statutes 1935 Chapter 665 Section 2.
Statement on Appeal line 17 to line 20 inclusive.
Statement on Appeal line 16 to line 22 inclusive.
Statement on Appeal line 24 to line 28 inclusive.

[fol. 17]

II

The evidence wholly fails to establish that the transportation herein involved was performed or to be performed by a motor carrier as defined by the motor carrier transportation agents act, to-wit, a common carrier, but does on the contrary establish that the carrier involved was and only was a private carrier.

Forsythe vs. San Joaquin Light and Power Corporation, 208 California 397.

Alword vs. Johnson, State Treasurer, 208 California 359.

Associated Company vs. Railroad Commission, 178 California 518.

California Jurisprudent Volume 4, Section 2, Page 814 and 815.

III

The eviden-e to show a business to have been dedicated to public use as a common carrier must be unequivical as regards the intention to dedicate to public use.

Clapp vs. Railroad Commission, 192 Cal. 689.

IV

The power to regulate commerce with foreign nations and among the several states is an exclusive power.

People vs. Downer, 7 Cal. 169.

V

The several states have no power to pass laws regulating commerce among themselves, but by United States Consti-
[fol. 18] tution Article I, Section VII, that power is vested exclusively in Congress.

Carson River Lumber Company vs. Patterson, 33 Cal. 334.

VI

Where the state has not the constitutional power by means of direct legislation to regulate the intercourse of its citizens with foreign nations and with the other states, it cannot accomplish by indirect method what it is forbidden to do directly.

People vs. Raymond, 34 Cal. 492.

VII

Congress of the United States has exclusive power to regulate interstate commerce.

Smith vs. Industrial Accident Commission, 26 Cal. App. 560 at 564.

Bedig vs. Southern Pacific Company, 84 Cal. App. 325.

VIII

Whenever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule.

Atchison Topeka and Santa Fe Railway Company vs. Railroad Commission, 190 Cal. 214.

IX

The license requirement of the Motor Carrier Transpor-
[fol. 19] tation Agents Act herein involved being Statute of 1933 Chapter 390 as amended by Statutes of 1935 Chapter 665 unconstitutionally affects interstate commerce.

Motor Transit Company, et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

X

As a matter of business, the sale of tickets or the arranging of transportation and the operation of stages cannot be separated in the matter of interstate and intrastate commerce.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

XI

The sale of a ticket or the arranging of transportation from one point to another over connecting lines to a designation across state lines cannot practically be made up by different persons.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

XII

The requirements that before a person is authorized to sell interstate transportation tickets or transportation, he must submit his application to the discretion of the State Railroad Commission and be passed by it and be required to place a bond and submit generally to the state regulations is unconstitutional and invalid.

[fol. 20] Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

DiSanto vs. Pennsylvania, 273 U. S. 34, 71 L. Ed. 524.

McCall vs. California, 136 U. S. 104, 34 L. Ed. 391.

Bowman et al. vs. Continental Oil, 256 U. S. 642, 65 L. Ed. 1139.

Adams Express Company vs. New York, 232 U. S. 14, 58 L. Ed. 483.

Cooney vs. Mountain State Telephone and Telegraph Company, 294 U. S. 384, 79 L. Ed. 934.

Krutcher vs. Kentucky, 141 U. S. 47, 35 L. Ed. 649.

Texas Transport et al. vs. City of New Orleans, 264 U. S. 150, 34 L. Ed. 907.

XIII

Under the act, no tickets or transportation of any nature could be arranged for even by officers or employees, or agents of any corporation, public carrier or otherwise, which would result in untold confusion and general inconvenience to the company and to the traveling public except by the Railroad Commision discretionarily licensing such persons, which act by its terms would be practically impossible of enforcement and does offend against the commerce clause of the United States Constitution.

Pennsylvania vs. West Virginia, 262 U. S. 553. 67 L. Ed. 1117.

Pierce vs. Society of Sisters, 268 U. S. 510, 69 L. Ed. [fol. 21] 1070.

Motor Transit Company et al. vs. Railroad Commission of California, 15 Fed. Supp. 630.

Respectfully submitted, Wyman G. Reynolds, Attorney for Defendant and Appellant.

Received copy of the within this 28 day of Mar. 1940.
John L. Bland, D. C. A., Attorney for Rspt.

[fol. 22] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

RESPONDENT'S POINTS AND AUTHORITIES—Filed March 28, 1940

I

The record in this case shows that McClure, owner of an automobile, told Thompson that he would like to secure some passengers going to Dallas, Texas, and that Thompson told him to report at his place of business upon a named day (Statement on Appeal, Page 4, Lines 15 to 24), and that when he reported at such place of business on the date named Thompson had four passengers (Statement on Appeal, Page 4, Lines 24 to 27.)

Witness Gene Farley testified that she paid Thompson money for transportation to Dallas, Texas (Statement on Appeal, Page 2, Lines 1 to 9), at which time Thompson told her he had a car going right away; that when the car came she was given a seat therein and her luggage was also [fol. 23] loaded in the car, at which time Thompson took up the receipts previously given her. (Statement on Appeal, Page 3, Lines 13 to 22).

The testimony of Bell Aldridge is to a similar transaction (Statement on Appeal, Page 2, Line 26 to Page 3, Line 9). She testified that "arrangements" for purchase of the transportation had been made with some other person. The testimony of Witness O'Dell, commencing on Page 3, Line 31 is to the same general effect.

There is some testimony to the effect that a person named Mills communicated with Thompson in regard to securing transportation for these passengers.

II

From consideration of the record it appears amply sufficient to support the implied finding of fact that Thompson sold transportation by automobile from Los Angeles, California, to Dallas, Texas.

III

For the purpose of this appeal it is not necessary to determine the part played by Mr. Mills. If it be considered that the sale was made by Mills, and that Thompson only collected the money, the judgment is supported by the provisions of Section 31, Penal Code. Thompson aided and assisted in the sale of such transportation and it does not appear that Mills was the holder of a license authorizing such sales.

[fol. 24]

IV

The matter of the validity of the act named in the complaint in this case, as applied to the sale of interstate transportation has been recently argued in this court sitting in Department 22 in the case of Wintjen vs. Board of Public Works, etc., Superior Court No. 447423, and is now under submission.

We see no need of repeating herein the rather lengthy list of citations and the extensive argument in that case.

V

The defendant attempted to raise the defense that he was advised by the Railroad Commission that he did not need a permit.

We are not unmindful of the decision in the case of People vs. Ferguson, 134 Cal. App. 41. We fail to see the application of that case to the case at bar. As the court pointed out (Page 52) the Corporate Securities Act is a most complicated law. It covers in its operation a multitude of businesses.

The difficult question which often arises is whether or not a certain method of business brings a person within the provision of that Act.

The necessity of a permit for persons coming within the provisions of the Act here involved, is never in doubt.

The law involved in the instant case defines with no un-

[fol. 25]

certainties a motor carrier transportation agent. It does not leave it to the judgment or discretion of some state official to determine whether doing certain acts constitutes engaging in the business of selling motor transportation. The defendant does not urge that the Railroad Commission informed him that he was not a transportation agent.

What actually happened was that the Railroad Commission undertook to be lawyers, and to pass upon the effect of a statute of the United States upon a then existing law of the State of California.

It is not my opinion that the District Court of Appeals did hold or intended to hold that where a law was plain in its provisions and unambiguous in its details the interpretation placed thereon by an administrative officer would justify disobedience thereof by members of the public.

To illustrate my meaning, we will suppose that a person convicted in the State of Iowa of the crime of burglary wished to possess a weapon capable of being concealed on the person, and that he was advised by a sheriff or chief of police or other official having the power to issue permits so to do that he was entitled to possess such weapon because the conviction of burglary did not make him a convict. It is not conceivable that reliance upon such advice would protect him from punishment for having violated the provisions of the California Concealed Weapons Act. Presuming that such sheriff issued a permit to this individual to [fol. 26] carry such weapon on his person, it can hardly be considered possible that such permit would protect him in such unlawful possession.

In short, it does not seem reasonable to suppose that by the ruling in the Ferguson Case, it was intended to let administrative officers set at naught all the penal laws of the state. To do so would have such a demoralizing effect upon the administration of the law that common sense tells us the ruling in the Ferguson Case should be confined in its application to exactly similar circumstances arising under that particular law. The court pointed out that the exception which they were then making was an exception to the general rule applicable to law enforcement.

VI

The invalidity of a rule of an executive board does not justify one in conducting a business for which a license is required.

Commonwealth vs. McCarthy (Mass.), 114 N. E. 287.

VII

The penalty for engaging in an occupation for which a license is required cannot be avoided because the adminis-

trative authorities charged with administering the law refused to grant a license.

State vs. Stevens (N. H.) 99 Atl. 723, L. R. A. 1917, 528.

[fol. 27]

VIII

Determination of whether a person violated the provisions of a law is not to be determined by the practice of an administrative board in its administration of the law.

State vs. Largomarcino-Grape Co. (Ia.) 223 N. W. 512.

IX

Courts may take judicial notice of the acts of executive departments of the state (C. C. P., Sec. 1875). It follows that courts may take judicial notice of the fact that though the Railroad Commission at one time undertook to officially promulgate a ruling to the effect that persons engaged in the occupation of selling only interstate motor transportation need not secure a permit, such board shortly thereafter—within about one or two months as is shown by papers on file in the Wintjen Case, supra,—promulgated a rule that all persons selling motor transportation, save and except those selling transportation over authorized interstate carriers, must secure a license from the Commission.

X

In view of the fact that the ruling in the trial court corresponds with conditions as they now exist, and as they have existed for several years under the rulings of the commission this court must presume that the trial court took judicial notice of the status existing at the time named in the [fol. 28] complaint.

XI

In as much as the incorrect information or ruling of the Commission which defendant claims to have received had been corrected by later action of the Commission it was proper for the court to refuse to permit introduction of evidence concerning the information alleged to have been given defendant unless it was shown to have been given him subsequent to the time the ruling last given as above stated was made, even though by some mysterious reasoning it can be said that the rule in the Ferguson Case should be

extended to cover the situation caused by the first ruling of the commission.

XII

The offer of proof was improper and insufficient. If defendant filed an application such application was itself the best evidence of whether the defendant actually filed an application in proper form. If, as stated, the Commission notified him by letter that he need not procure a license, such letter was the best evidence of what the Commission informed him.

In the record there appears no offer to introduce such proper evidence and the record indicates, at least to us, that the offer was to prove certain facts by parol evidence to be given by the defendant.

[fol. 29]

XIII

It appears that the court did not err in refusing to accept proof concerning the ruling of the Commission upon appellants offer of proof.

It further appears that if such proof of what occurred in 1931 was admissible such testimony would have been properly offset by showing promulgation of a different ruling upon the subject. Therefore, such exclusion of evidence did not prejudice the appellant.

IX

As pointed out heretofore, there exists in the records technical reasons why the ruling of the court upon admission of evidence must be sustained.

However, determination of the effects of the ruling in the Ferguson Case, supra, and the limitations which must be placed upon the application of such ruling is of such importance that it is hoped the court will not content itself with supporting the judgment upon technical grounds, but will explain for the benefit of trial courts the actual effect of the Ferguson Case.

Respectfully submitted, Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent.

[fol. 30] Received copy of the within this 28 day of Mar., 1940.

Wyman G. Reynolds, Attorney for Deft. & Appel.

[fol. 31] IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

MEMORANDUM OPINION—Filed June 4, 1940

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed with directions.

Two conclusions are inescapable. In the first place the evidence supports the conviction; appellant did violate the terms of the statute (Act 5130c, Deering's Gen'l Laws 1937) that prohibits an unlicensed person from acting in the capacity of a motor carrier transportation agent. He sold transportation over the highways of this state, which a Mr. McClure had offered to furnish. He (the defendant) thus acted in the capacity of a motor carrier transportation agent under sections 2 and 14 of the act, if Mr. McClure was a motor carrier. That Mr. McClure was a motor carrier, within the definition of that term in section 2 of the act, follows from the unadorned fact that he offered to transport persons for compensation over the highways of this state.

[fol. 32] It also appears, however, that the only transportation Mr. McClure offered to furnish, and the only transportation the defendant sold, within the confines of this case, was from Los Angeles, California, to Dallas, Texas. The requirement of the act (sections 3 and 8) that no one may act as agent in selling transportation without securing a license, to obtain which a one thousand dollar bond must be provided, in so far as it is attempted to be applied to a purely interstate operation such as that involved here, is a direct not merely incidental burden on interstate commerce, beyond the power of a state to impose. The case of Motor Transit Co. v. Railroad Commission of California (1936) 15 Fed. Supp. 630, so held with respect to the statute we are considering, and as pointed out by Judge Wilbur (p. 633), "The decision of the Supreme Court in Di Santo v. Commonwealth of Pennsylvania, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524, is decisive upon that question."

Because the complaint is defective is not alleging the acts claimed to have been done by the defendant except by

an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Bishop, Judge.

Dated June 4, 1940.

I concur.

Schauer, Judge.

[fol. 33] CONCURRING OPINION

I concur. This case is distinguishable from that involved in Wintjen v. City of L. A., L. A. Superior Court No. 447423. There, according to the complaint considered, the plaintiff sold no tickets or transportation and collected no money in payment for transportation, but merely conducted a sort of information bureau where those desiring transportation and those willing to furnish it might be brought together so that they could make their own arrangements. It was held that such a business did not so directly affect interstate commerce as to remove it from the power of the state unless Congress should act upon it. To that decision I still adhere. See Hartford Acc. etc. Co. v. Illinois (1936) 298 U. S. 155, 80 L. Ed. 1099. In this case, however, the defendant directly sold the transportation to those desiring it and collected the price thereof. While he did not issue anything denominated "tickets," he did give the prospective passengers receipts which served the same purpose and were taken up by him when transportation began. I can see no way to escape the application of the authorities cited in the foregoing opinion to such a case. But the statute is not thereby rendered invalid as a whole. It may still operate on intra-state transportation and in cases which are like the Wintjen case in their facts.

Shaw, Presiding Judge.

[fol. 34] [File endorsement omitted.]

[fol. 35] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PETITION FOR REHEARING—Filed June 10, 1940

Comes now the above named respondent and respectfully petitions the Court to vacate and set aside the decision heretofore rendered in the above entitled matter, and to grant a rehearing upon the questions involved in the appeal in such case, and as grounds therefor, alleges:

I

That the Court erred in holding that the decisions in the cases of Motor Transit Company v. Railroad Commission, 15 Fed. Supp. 630, and Di Santo v. Commonwealth of Pa., 273 U. S. 34, 71 L. Ed. 524, governed the case at bar.

II

That the Court erred in holding that certain statements found in the above named cases are now the law, as deter-
[fol. 36] mined by the decision of the United States Supreme Court.

III

That the Court erred in not giving proper legal effect to the provisions in the Federal Motor Carrier Act exempting from its regulatory provisions carriage of passengers by casual, occasional and reciprocal carriers.

Argument

Point I

The Di Santo and Motor Transit Company Cases Do Not Govern the Case at Bar

It is a principle too well settled to require extended discussion that statements found in decisions of our courts must be limited in this application to the facts which were before the Court. It becomes necessary then for us to examine the facts in each of the cases heretofore named and to

which reference was made in the opinion of this Court for the purpose of determining whether there appears facts common to such cases and the case at bar so as to impel the conclusion that those cases are decisive of the point involved in the pending appeal. In view of the fact that the Motor Transit Company decision is bottomed upon the Di Santo case, we shall first examine such latter case.

Such examination discloses that Di Santo was an authorized agent for four steamship companies.

"Plaintiff represented four steamship companies oper- [fol. 37] ating steamships between the United States and Europe. Each of them gave him a certificate authorizing him to sell * * *, tickets and orders for transportation * * *."

Di Santo v. Commonwealth, supra, L. Ed. p. 526.

The tickets sold were furnished Di Santo by the various companies (Id. same page) and he accounted to his principals (the steamship companies) for such tickets (Id. same page).

It is not here contended that Di Santo was a salaried employee of the various companies. Except as to the method whereby he received remuneration for his work he was as much a representative of the companies as he would have been had he been upon the payrolls of such firms as a ticket agent. The regulation objected to was therefore a direct regulation of the companies themselves.

There is a vast gulf between the person who is a direct representative of a firm engaged in interstate commerce selling the articles furnished him by his employer, at a place of business named by such employer, and one who secures orders for or sells a given article upon his own account, placing the custom he secures with whatever firm best suited to his convenience. In the one case he is the representative of the firm which has engaged his services. In the other case he is an independent contractor.

The Di Santo case has been distinguished by the court which wrote the decision. In the case of Milk Control Board [fol. 38] v. Eisenberg Farm Products, 306 U. S. 346, 83 L. Ed. 752, the court said: (L. Ed. p. 756)

"None of the decisions on which the court below and the respondent rely rules the instant case. Di Santo vs. Pennsylvania, 273 U. S. 34, 74 L. Ed. 524, 47 S. Ct. 267, *involved*

a state law directed solely at foreign commerce." (Emphasis added.)

In the Milk Control Board case, supra, the court also said (L. Ed. p. 756):

"This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens."

As pointed out above, except as to matters of such nature, that if regulated at all, all regulations must be uniform throughout the nation, the states are at liberty to act so [fol. 39] long as Congress has not seen fit to act. That the licensing of motor carrier ticket agents is not a matter requiring uniform regulation, but is susceptible of regulation calculated to meet local conditions, seems to us to be so patent that no extended argument is required to support the proposition.

As we shall hereafter point out in detail, the federal law does not attempt to regulate the business of the appellant, and in fact, explicitly excludes it from such federal regulation.

Examination of the Motor Transit Company case, supra, discloses that the action was instituted,—not by persons acting as motor carrier transportation agents, but, by motor carriers engaged in interstate commerce. The action was brought to preserve and protect their rights as operators of passenger stage lines, and not for the purpose of protecting the rights of their employees or of other persons selling transportation. Again the well known rule, that statements made in an opinion are to be read in the light of the facts before the court in the case in which the statements were made, applies.

It is not, however, so necessary to depend upon the rule in considering this case for it affirmatively appears by the

decision itself that the court expressly limited the effect of their opinion to the situation of the plaintiffs, and, of course, those similarly situated.

[fol. 40] The court said: (15 Fed. Supp. p. 630)

"The issue here is narrowed to the point: Does the license requirement unconstitutionally affect interstate commerce *to the irreparable injury of complainants?*" (Emphasis added.)

The court in such case grounded its opinion upon the statement in the Di Santo case, supra, to the effect, that a state could not impose a direct burden upon interstate commerce. As we shall hereafter show more fully, the court which decided the Di Santo case has, since the decision in the Motor Transit Company case, repudiated the doctrine that states may place no direct burden upon interstate commerce, and has declared such direct interference legal if the local situation justifies the enactment of the statute.

The overruling of the rule in the Di Santo case necessarily renders the quotation thereof in the Motor Transit Company case ineffective, and insofar as the Motor Transit Company case may depend upon the Di Santo case for its correctness it now is a decision without a foundation, and is itself overruled by a later decision of a higher court.

Point II. State Laws Which Directly Affect Interstate Commerce Are Not Necessarily Invalid

Because of the fact that this court quoted certain language from the Di Santo case, we conclude that the court felt [fol. 41] that this law directly affected interstate commerce and that any state statute which directly affects interstate commerce is invalid. While we cannot agree with the conclusion, that one whose entire operations are local in character and who peddles his interstate business to whomsoever he finds willing and able to handle the same, is engaged in interstate commerce, we do not find it necessary to argue the point here. If it can be said, that the quoted portion of the Di Santo case is to be considered as a flat, unqualified statement of constitutional law, without taking into consideration the facts involved in that case, we find that by direct and unequivocal language the same court has overruled such quoted language in a subsequent decision.

In Eichholz v. Public Service Commission, 306 U. S. 268, 83 L. Ed. 641, the court said: (83 L. Ed. p. 646)

"But in the absence of the exercise of federal authority, and in the light of local exigencies, *the State is free to act in order to protect its legitimate interests even though interstate state commerce is directly affected.*" (Emphasis added.)

It thus appears that, whatever may have been the rule of law at the time of the Di Santo and Motor Transit Company cases, the rule as laid down by the Supreme Court now is that state legislation, in itself a proper exercise of the police power, does not run counter to the provisions of the Federal Constitution, even though interstate commerce [fol. 42] be directly affected, but that a state law may not conflict with federal enactments.

Point III. Congress Specifically Exempted Occasional Irregular and Incidental Carriers or Passengers from Federal Regulation

The Federal Motor Carriers Act of 1935 (U. S. C. A. Title 49, Chapt. 8, Sec. 303, Subdiv. (b), insofar as pertinent to this case, provides as follows:

"Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (here follow a list of seven positive exclusions) nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter * * * apply to: (8) * * * or (9) the casual, occasional or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

Whether the provision apparently intended to give the Interstate Commerce Commission authority to determine [fol. 43] whether control of that class of carriers named in Item 9 as casual, occasional or reciprocal carriers, hereafter referred to as Casual Carriers, if investigation by the Com-

mission should show the need therefor, actually gives the Commission power to take over the regulation of carriers need not be determined at this time.

It is not claimed by anyone that the Commission has taken action which would authorize them to take jurisdiction and regulate such carriers.

Section 311 of such Chapter 8 provides for licensing of persons who sell transportation which is subject to such Chapter 8.

Before securing such license he must prove that he is a fit and proper person to engage in the business of selling such transportation and must provide a bond in an amount set by the Commission.

Insofar as this law is concerned the only independent ticket agents or brokers required to procure licenses from the Commission are those selling transportation governed by the Act.

Transportation by casual carriers is not now governed or regulated by the Act; hence, brokers who, as did the appellant, sell tickets for transportation by casual carriers do not come within the provisions of Section 311 requiring that they secure licenses from the Commission. In other words, the federal law does not at present govern or regu- [fol. 44] late the activities of casual carriers or ticket brokers or agents selling transportation by such casual carriers.

In Mauer v. Hamilton, — U. S. —, 84 L. Ed. (Adv. Sheets) 641, the court said, at page 679:

"As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especailly the case when public safety and health are concerned. Kelly v. Washington, 302 U. S. 1, 10-14, 82 L. Ed. 3, 10-13, 58 S. Ct. 87; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85, 83 L. Ed. 500, 505, 59 S. Ct. 438 and cases cited."

In Kelly v. Washington, 302 U. S. 1, 9, 82 L. Ed. 3, 10, the court said:

"Under our constitutional system there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their ter-

ritorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 402, 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151 Ann. Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective [fol. 45] power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' (Citing numerous cases.)"

In Atchison, Topeka and Santa Fe Railway v. Railroad Comm. of Calif., 283 U. S. 380, 392, 75 L. Ed. 1128, 1137, the court said:

"The considerations which led the court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required. The principle thus applicable had been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the [fol. 46] state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state."

A case very much in point is Hartford Accident & Indemnity Co. v. People of the State of Illinois, 298 U. S. 155, 80 L. Ed. 1099.

The Illinois statute involved required that persons dealing in consignments of farm produce for sale on commission must secure a license and provide a bond in the sum of $5,000.00.

The appellant was surety upon the bond of the Cross Company, a bankrupt, and instituted suit to avoid liability upon the bond. The basis of the claim of nonresponsibility was that the law was unconstitutional on account of placing a bruden on interstate commerce.

The federal act, which appellant urged rendered the state act void, differed from the Motor Carriers Act of 1935 in that in addition to not covering the entire field of regulation it especially provided that state statutes not in conflict were to remain in full force and effect. It is patent, however, that such provision could be nothing more than a rule of interpretation. If the statute of Illinois actually placed an unlawful burden on interstate commerce in violation of constitutional provisions, a declaration of policy by Congress could not make it any the less so.

There is a similarity of facts between that case and the [fol. 47] one at bar. In the Hartford Accident & Indemnity Co. case appellant's principal was a dealer in goods received in interstate commerce, and sold the goods in the local market as an independent contractor or commission agent. In the case at bar the appellant is a local dealer in transportation, making contracts upon his own account and not as agent of the operator of a motor carrier, and ships passengers so secured by whomsoever he finds willing to haul his custom.

In the Hartford Accident & Indemnity Co. case, 80 L. Ed. 1099, at page 1101, the court said:

"The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells farm produce forwarded to him from points without, as well as points within the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article 1, Sec. 8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective.

"The appellant urges, however, that Congress had adopted [fol. 48] an act regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the Federal act does not cover the same field, or is consistent with it. But it is said the state and Federal laws are similar in their provisions and, therefore, the exercise by Congress of its paramount power nullifies the state statute. The Federal act requires every person, partnership, association, or corporation, who is engaged in the business of receiving in interstate or foreign commerce perishable agricultural commodities, defined as 'fresh fruits and vegetables of every kind and character,' for sale on commission to procure a license from the Secretary of Ag-iculture. The act parallels the state statute in respect of the requirements of proper accounting, honest dealing, and prompt remittance. While it provides for awards of reparation by the Secretary of Agriculture for non-compliance with its prescriptions, gives a right of action to consignors and shippers for violation of its provisions, authorizes the revocation of licenses and imposes penalties, thus covering to some extent the same ground as the State law, it does not call for the giving of any bond by a licensee. Moreover, Sec. 15 provides:

'This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall [fol. 49] remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto.'

"Thus the act of Congress not only omits the requirement of a bond, but affirmatively saves the provision of the Illinois act as to that form of security. As respects the bond and the protection thereby afforded to consignors, there is not inconsistency between the two acts and both may be given effect."

The situation presented to the court in the Motor Transit Company case and in the case at bar is easily distinguished.

In the Motor Transit Company case acts of their agents were acts of the company and the company was directly engaged in interstate commerce. In the case at bar the act of the appellant was not the act of the carrier but was in fact a local transaction wholly completed, insofar as the sale of transportation was concerned, when his deal with pro-

spective traveler was closed. There was still no liability assumed by a carrier. Thompson had entered into a contract to secure transportation for his client by some person then unknown to such client. The client did not look to any carrier for fulfillment of his contract but looked only to Thompson to see that he was transported to his promised land.

The analogy between the situation presented by the facts in the Hartford Accident & Indemnity Co. case, supra, and [fol. 50] the case at bar impels the conclusion that, even though the Hartford Accident & Indemnity Co. case did not involve the sale of transportation the law of that case must govern the instant appeal.

As aptly pointed out in Francis v. Allen (Ariz.) 96 Pac. (2d) 277, the operation of the law is only upon the person engaged in the business of selling tickets and does not attempt to prohibit or regulate the transportation of passengers.

In the case of Columbia Terminals Company v. Lambert, 30 Fed. Supp. (Adv. Sheets) 28, the court said:

"The first ground assigned as a basis for the claim of unconstitutionality of the state statutes is without merit. That state regulatory laws relating to the operation of motor vehicles in interstate commerce were not superseded upon the enactment of the Motor Carriers Act of 1935 has now been definitely determined. Eichholz v. Public Service Commission of Missouri, 306 U. S. 268, 622, 59 S. Ct. 532, 83 L. Ed. 641; H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 59 S. Ct. 438, 83 L. Ed. 500; South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734."

We quote further, as follows:

"Since the Interstate Commerce Commission has not assumed authority to regulate plaintiff's operations here involved the authority of the state to regulate those opera- [fol. 51] tions has not been superseded."

and as follows:

"Absent action under the federal statute, the power of the state to regulate or burden interstate commerce extends only to acts consistent with an exercise of police power or proper taxing power. *Reasonable police regulation are*

not an unlaful burden upon interstate commerce and are justified so long as Congress has not occupied the field." (Emphasis added.)

That the matter is one which requires regulation is pointed out in Finn v. R. R. Comm., 2 Fed. Supp. 891; that the Federal law does not cover has not been disputed.

The situation which confronts us is well stated in Latta Truck Lines v. Hargus, 29 Fed. Supp. 53, 55.

"Since there has been no actual adjudication of plaintiff's status by the Interstate Commerce Commission and since it appears that a long period of time may elapse before that body may have an opportunity to act in that regard, to now restrain the defendants from preventing that which the Missouri Commission has characterized as a pretext for the purpose of avoiding the payment of charges incident to the use of the public highways, would result in neither the local commission, because of lack of authority, or the federal commission, because of lack of opportunity, being able to cope with the situation. The legislative intention to regulate motor vehicle transportation for hire over the [fol. 52] highways of the state and nation is indubitably evidenced by existing State and Congressional legislation."

That part of the opinion heretofore rendered, holding the law void as to appellant, should be vacated and set aside.

Conclusion

The difference between the facts in the Motor Transit Company case and the case at bar are in principle the same as the difference between a firm engaged in shipping fruit purchased by its agent, and a person engaged in buying gruit in the local market and selling to a firm shipping interstate.

In the case of purchase by shipper, the purchase would be incidental to the transportation and the entire transaction would be interstate in character. The seller of the fruit would know the firm to which he sold and would look to them for payment. In the case of purchase by one expecting to sell to shipper the transaction would be entirely local up to the time the purchaser closed his deal with the seller.

In the matter of the Motor Transit Company the purchaser of transportation would buy direct from the carrier

to whom he looked for performance of the contract. In the case at bar his transaction was not with the carrier but was with a local dealer to whom he looked to supply him with the transportation he purchased.

If the local purchase of fruit for subsequent sale to an interstate shipper is intrastate commerce, and we do not [fol. 53] think it can well be argued that such is not a fact, certainly the local sale of transportation to be accomplished by some deal between the seller and some one willing to undertake the carriage is not interstate commerce, and the fact that the seller may have in mind some person who is willing to accept his commitments does not alter the fact.

But, even if it be considered that the transaction has some of the earmarks of interstate commerce, it is so far removed from interstate channels at the time the ticket is sold that any interference is indirect and incidental. However, as shown heretofore, the mere fact that a state law directly affects interstate commerce does not render it invalid so long as it does not place an undue burden thereon.

As to the form of complaint, there is no objection to the conclusion of the Court, and there is no objection to the judgment being reversed and remanded with instructions to amend the complaint before again placing appellant on trial.

Wherefore, respondent respectfully submits, that the decision hertofore rendered in the above entitled proceeding be set aside and the case again placed upon the calendar for argument, or, that the judgment rendered in said action by the trial court be reversed upon the sole ground that the complaint was insufficient to state a cause of action under the law.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney, Attorneys for Plaintiff and Respondent.

[fol. 54] AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013a)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

RHEBA KELLNER, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County

of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 260 City Hall, Los Angeles, California; That on the 10th day of June 1940 affiant served the within Petition for Rehearing on the defendant and appellant in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said defendant and appellant, at the office address of said attorney, as follows: Wyman G. Reynolds, Attorney at Law, 1223 Chester Williams Building, Los Angeles, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post-office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place [fol. 55] so addressed.

Rheba Kellner.

Subscribed and sworn to before me this 10th day of June 1940. Dorothy Simpson, Notary Public in and for the County of Los Angeles, State of California.

[fol. 56] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

ORDER GRANTING REHEARING—Filed July 3, 1940

The petition of respondent for a rehearing after judgment of this court on appeal in the above entitled case having been filed and having been duly considered,

It is Now Ordered that said petition be granted, the judgment of this court heretofore rendered in said case is hereby vacated and a rehearing is hereby ordered. Said case is hereby submitted for decision without further argument.

Dated: July 3, 1940.

By the Court: Shaw, Presiding Judge. Bishop, Judge. Schauer, Judge.

[fol. 57] In Appellate Department of the Superior Court, County of Los Angeles

Superior Court No. CR A 1692

Trial Court No. 93602

People of the State of California, Plaintiff and Respondent

vs.

E. W. Thompson, Defendant and Appellant

Memorandum Opinion on Rehearing—Filed October 15, 1940

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed.

The complaining witness paid for what she believed to be, and so far as we are aware proved to be, transportation from Los Angeles to Dallas, Texas. No one so far has questioned what seems to us to be an obvious conclusion, that whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again. The contract made with the complaining witness, therefore, was in the field of interstate commerce.

Who was it that undertook to transport the complaining witness (and three others) to Texas? In an endeavor to distinguish the case under review from Di Santo v. Pennsylvania (1927) 273 U. S. 34, 71 L. ed. 524, counsel for the [fol. 58] People picture our case as one where the defendant "secures orders * * * upon his own account * * * he is an independent contractor." The evidence supports this conclusion, i. e., that the defendant as principal undertook to transport the complaining witness to Texas. If so, the defendant would appear as the motor carrier and not as a motor carrier transportation agent, and the judgment of conviction would have to be reversed on that ground. The evidence, however, also supports the conclusion, doubtless reached by the trial judge, that the owner and driver of the automobile was the motor carrier, the principal in the transaction, and that the defendant acted

as his agent in securing passengers and in collecting compensation for the passage. On this view of the evidence, the defendant was proven guilty of the charge brought against him, for admittedly he did not have the license required by the act.

Can the act (Act 5130c, Deering's Gen'l Laws) validly do that which it has expressly attempted to do until federal action takes the field, i. e., require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce? In answering this question we are gently admonished by counsel to follow cases which are in point rather than those which involve facts far afield. So it is that we follow Di Santo v. Pennsylvania, referred to above, rather than Hartford &c Co. v. People (1936) 298 [fol. 59] U. S. 155, 80 L. ed. 1099; Milk Control Board v. Eisenberg Farm Products (1939) 306 U. S. 346, 83 L. ed. 752; McGoldrick v. Berwind-White Coal Mining Co. (1940) 84 L. ed. Adv. Ap. 343; Maurer v. Hamilton (1940) 84 L. ed. Adv. Op. 671, each of which deals with a statute affecting interstate commerce at points quite removed from that where our statute presses. The Di Santo case, however, is much in point. There an individual had been convicted of acting as ticket agent without the license and bond required of one selling tickets on behalf of steamship companies. The license and bond were not required of those actually furnishing the transportation, nor of their officers or employees, nor were they parties to the action. The judgment of conviction was reversed, however, because, the federal supreme court held, (1) to require a license and bond of one who was the ticket agent of a company engaged in foreign commerce was to place a burden on foreign commerce which a state may not impose, and (implicit in the decision), (2) of the statute's invalidity the ticket agent may complain.

It may well be that the next time this question is presented to the supreme court a different answer will be given. It is within their power, not ours, to reverse their decisions. It may be that they would differentiate our statute from that involved in the Di Santo case because the latter dealt with foreign commerce, while our statute deals with interstate commerce. We find in the words [fol. 60] granting power to the Congress, "To regulate Commerce with Foreign Nations, and among the several

States, and with the Indian Tribes" (Art. I, sec. 8, U. S. Const.) no recognition of a greater immunity from state legislation affecting foreign commerce than that affecting interstate commerce. We recognize that many state-imposed burdens on and many state-created conflicts with interstate commerce have been permitted. But the particular burden involved here has been adjudged one that a state may not impose. We feel bound by the supreme court's determination of the question.

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action. If, as may be, the People are in a position to prove that the defendant acted as ticket agent for motor carriers doing an intrastate business, the dismissal may be made for the purpose of filing an amended complaint.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated October 15, 1940.

Bishop, Judge.

We concur.

Shaw, Presiding Judge. Schauer, Judge.

[fol. 61] [File endorsement omitted.]

[fol. 62] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PETITION FOR REHEARING—Filed October 22, 1940

Comes now the People of the State of California, Plaintiff and Respondent in the above entitled action and respectively petitions the court to set aside the decision and order heretofore made in such action and grant a rehearing in said cause.

As grounds for such petition we respectfully urge that the court erred in holding that the case of Di Santo v. Penn-

sylvania, 273 U. S. 34, 71 L. ed. 524, was determinative of the question of law involved in the instant proceeding; that the court failed to give proper weight to the rule of law that where the federal government has failed to enact statutes covering a matter within the legislative powers of the federal government the State may make proper regulations to protect the interests of its citizens, and has failed to properly evaluate the provisions of the Federal Motor Carriers Act which explicitly withdraws from federal regulation [fol. 63] certain classes of motor carriers.

The facts in the Di Santo case differ materially from the facts before the court in the case at bar. As shown by the opinion in the Di Santo case the appellant there was an employee of four steamship companies. True enough he was not on the payrolls of the various lines. He was, however, entrusted with tickets of the various lines, and was authorized by the various lines to make contracts for transportation in their behalf. The only difference between the situation of the appellant there and ordinary agents of such steamship companies was in the method whereby the companies remunerated the persons selling transportation.

The court said in deciding the Di Santo Case:

"A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."

It is noted that the court stated that a statute which directly interferes with Foreign Commerce is a prohibited regulation. So far as we have observed the rule that a state may to some extent regulate interstate commerce in the absence of federal regulation has never been applied to foreign commerce. It becomes apparent that the court in the Di Santo case was considering only the effect of the rule upon foreign commerce. We think this conclusion is inevitable, even though some of the cases cited by the court [fol. 64] upon certain points, or in support of certain statements relate to interstate commerce.

Another point to be considered is the statement of the court that the sales by the broker were as directly related to foreign commerce as were sales made in offices maintained by the various steamship companies. It does not appear from the record in the case before this court that

the person who was going to transport the persons to whom tickets were sold was regularly engaged in the transportation of persons or property in interstate commerce, or that the defendant and appellant was in any degree an employee of the person who would furnish the means of transportation. Certainly there is nothing to indicate that the transaction out of which this prosecution grew was in any manner connected with foreign commerce. The intent of congress to exclude states from exerting their police power in connection with interstate commerce must be clearly manifest to exclude state action.

Napier v. Atlantic Coast Line Railroad Company, 272 U. S. 605, 71 L. ed. 432.

The power of the state to prescribe local regulations which are applicable to articles moving in interstate commerce is aptly pointed out in the various cases involving validity of state pure food laws. See Savage v. Jones, 225 U. S. 501; 56 L. ed. 1182.

As pointed out in the Atlantic Coast Line case, supra, [fol. 65] it is often a question for the courts to decide whether congress intended to occupy the entire field of regulation and thereby exclude the state. We are not confronted with this difficulty in the instant case. As pointed out in briefs heretofore filed, congress expressly excluded from interstate regulation transportation by casual and incidental carriers.

In Townsend v. Yeomans (1937), 301 U. S. 441; 81 L. ed. 1210, the court said:

"The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. Savage v. Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 S. Ct. 715; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 293, 294, 58 L. ed. 1312, 1318, 1319, 34 S. Ct. 829; Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 279; Carey v. South Dakota, 250 U. S. 118, 122, 63 L. ed. 886, 888, 39 S. Ct. 403; Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 35, 73 L. ed. 161, 167, 49 S. Ct. 69, 62 A. L. R. 805; Atchison, T. & S. F. R. Co. v.

Railroad Commission, 283 U. S. 380, 392, 393, 75 L. ed. 1128, 1136, 1137, 51 S. Ct. 553; Hartford Acci. & Indem. Co. v. [fol. 66] Illinois, 298 U. S. 155, 158, 80 L. ed. 1099, 1101, 56 S. Ct. 685."

We are not unmindful of the fact that the court went on to point out that they found no actual burden upon interstate. However, in view of the statement in the Eicholz case, heretofore cited to the court and discussed in our briefs, that even a direct burden upon interstate commerce is permissible, it can hardly be held that the decision in the Townsend case, supra, was based upon the lack of actual imposition of burdens upon interstate commerce. If such should be the logical conclusion it seems to be reasonable to conclude that the Eicholz case, decided subsequent to the Townsend case had the effect of overruling that part of the Townsend case.

The only thing required of persons coming within the provisions of the Act involved in the instant proceeding is that they secure a license from the railroad commission and provide an adequate bond to protect persons with whom they have dealings.

In Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92, 77 L. ed. 1053, decided subsequent to the Di Santo case the court upheld the right of the states to prohibit interstate movement of vehicles over state highways if the reason for such prohibition was for the protection of public safety. The court pointed out that they had previously held that states may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. The license fee under the Act here involved is of [fol. 67] such an inconsequential amount that it cannot well be said that payment of such fee imposes a burden upon interstate commerce. The only thing actually involved in this case is whether or not the state may require agents to post bonds to insure the fulfillment of their contracts. Attention is directed to the fact that under the provisions of the Federal Motor Carriers Act ticket agents not in the employ of carriers, but acting as brokers, are required to secure permits and post bonds if they sell tickets over lines which are themselves within the regulatory provisions of the Act. In other words, it appears from the face of the Federal Act itself that the requirement of bond for those

engaged in selling transportation as brokers or independent operators is not an unreasonable restriction upon interstate commerce. However, because the federal government expressly excluded occasional incidental and casual carriers from the operation of the federal law, the requirement of bond for those selling transportation as brokers does not apply to the appellant here, and the only existing method whereby the interests of the public may be protected is by state action. We therefore urge that if the transaction involved in the instant case is to be considered as a transaction in interstate commerce, the Act of the legislature here in question does not conflict with the federal law, and that the state, in the interest of protection of the rights of its citizens, has the power to require that those who sell trans-
[fol. 68] portation of persons by motor vehicles operating as occasional, incidental or casual carriers secure a license from the state and post bond for faithful performance of their contracts.

In making the foregoing argument we are not to be understood as abandoning the argument heretofore made to the effect that the transaction involved in the instant case is purely a local transaction, not coming within the inhibitions of interstate regulation by the federal government. No good purpose would be served, however, by burdening the court with a repetition of the argument heretofore presented.

Wherefore, your petitioner respectfully asks that the decision of the court heretofore made in the above entitled action be vacated and set aside, and that the case be again placed upon the calendar of the court for such further consideration as may be right and proper in the premises.

Respectfully submitted, Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney; John L. Bland, Deputy City Attorney.

[fol. 69] AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013A)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

EDNA VOGT, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years

and is not a party to the within and above entitled action; that affiant's business address is 260 City Hall, Los Angeles, California; That on the 22nd day of October, 1940 affiant served the within Petition for Rehearing on the Attorney for defendant and appellant in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said defendant and appellant, at the office address of said attorney, as follows: Wyman G. Reynolds, Attorney at Law, 1223 Chester Williams Bldg., Los Angeles, California and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Postoffice at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

Edna Vogt.

Subscribed and sworn to before me this 22nd day of October, 1940. Dorothy Simpson, Notary Public in and for the County of Los Angeles, State of California. (Notarial Seal.)

[fol. 70] In Appellate Department of the Superior Court, County of Los Angeles

[Title omitted]

Order Denying Rehearing—Filed October 24, 1940

The petition of respondent for a rehearing after judgment of this court on appeal in the above entitled case having been filed, and having been duly considered,

Said petition is now hereby denied.

Dated October 24, 1940.

By the Court. Shaw, Presiding Judge. Bishop, Judge. Schauer, Judge.

[File endorsement omitted.]

[fol. 71] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

CERTIFICATE OF TRIAL COURT

I hereby certify that I am one of the Judges of the Municipal Court of the City of Los Angeles in the County of Los Angeles, State of California, and that as a Judge of said Court I presided at the trial of the above entitled cause.

I further certify that during the trial of said action, after both sides had rested, the defendant urged as grounds for a judgment of "not guilty" that the statute which the defendant therein, E. W. Thompson, was charged with having violated (Chapter 339, Stats. 1923) was void and unconstitutional for the reasons that (1) it constituted a burden upon interstate commerce in violation of the provisions of the Constitution of the United States, and depended upon Motor Transit Co. vs. Railroad Commisison of California, 15 Fed. Supp. 630, as supporting his contention, and (2) the Congress of the United States has enacted a law governing and regulating the operation of motor carriers engaged in interstate commerce (Motor Carrier Act 1935, Title 49, U. S. C. Secs. 301 to 327), and the State of California is without power to enforce the statute which he was charged with having violated.

[fol. 72]

In reply to defendant's argument, plaintiff, The People of the State of California, by written briefs and by oral argument, urged that the statute in question was a valid regulation under the police power of the state, citing Finn vs. Railroad Commission of California, 2 Fed. Supp. 891, in support of their position; that it did not trench upon the powers of the federal government or conflict with any provisions of the federal constitution, and that the business or acts of the defendant did not come within the purview of the Motor Carrier Act—1935, (Title 49, U. S. C. Secs. 301 to 327). Citing in support of their contention Welch Co. vs. State of New Hampshire, 306 U. S. 79; Eichholz vs. Public Service Comm., 306 U. S. 279, and Sprout vs. City of South Bend, 277 U. S. 163.

Byron J. Walters, Judge. (Seal.)

Attest: Urban F. Emme, Clerk of the Municipal Court, City of Los Angeles, California.

[fol. 73] [Endorsed:] No. 93607. Certificate of Trial Court. Filed Nov. 12, 1940. L. E. Lampton, County Clerk, by J. B. Williams, Deputy.

[fol. 74] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed October 24, 1940

Upon application of the People of the State of California, respondent in the above entitled cause by Ray L. Chesebro, City Attorney, W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, their counsel, for a Stay of Execution of the judgment of the Municipal Court of the City of Los Angeles, in the County of Los Angeles, State of California, made and entered the 16th day of November, 1939, No. 93607, to enable said People of the State of California to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States,

It is Ordered, that the execution and enforcement of said judgment be and it hereby is stayed until the 1st day of February, 1941, to enable said People of the State of California to apply for and obtain a Writ of Certiorari from the [fol. 75] Supreme Court of the United States.

Dated this 24th day of October, 1940.

Hartley Shaw, Presiding Judge, Appellate Department of the Superior Court, County of Los Angeles, State of California.

[fol. 76] [File endorsement omitted]

IN APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES

[Title omitted]

PRAECIPE AND STIPULATION—Filed November 6, 1940

To the Clerk of the above entitled court:

Please prepare and transmit to the Clerk of the Supreme Court of the United States, a transcript of the record upon the Appeal taken by respondent People of the State of California, from the judgment of the Municipal Court of the

City of Los Angeles, in the County of Los Angeles, State of California, No. 93607 therein, and include the following papers:

1. The complaint.
2. The judgment of the Municipal Court.
3. Statement on Appeal.
4. Notice of Appeal.
5. People's Exhibit "A".
6. Defendant's Exhibit "I".
7. Appellant's Points and Authorities filed prior to the original submission of said case on March 28, 1940.
8. Respondent's Points and Authorities filed prior to the [fol. 77] original submission of said case on March 28, 1940.
9. The opinion and the concurring opinion of the court dated June 4, 1940.
10. Respondent's petition for rehearing filed on or about June 10, 1940.
11. The order of the court dated July 3, 1940, granting rehearing.
12. The judgment of the court rendered October 15, 1940.
13. Plaintiff's petition for rehearing filed October 22, 1940.
14. The order of the court dated October 24, 1940, denying petition for rehearing.
15. Statement of the trial court.
16. Copy of order of the presiding judge of the Appellate Department of the Superior Court staying proceedings in said action.
17. This Praecipe and Stipulation.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent.

It is Hereby Stipulated and Agreed, that the Clerk make up the transcript of the record to be filed in the Supreme [fol. 78] Court of the United States, and include in said record all of the pleadings, papers, exhibits and records mentioned in the foregoing praecipe.

It is Further Stipulated and Agreed, that whereas it is necessary to print such record for the use of the Supreme Court of the United States, the Clerk of the Supreme Court is hereby authorized to omit from such printed record all

matters not essential to a consideration of the question presented by the petitioner for a Writ of Certiorari.

Dated this 6 day of November, 1940.

Ray L. Chesebro, City Attorney; W. Jos. McFarland, Assistant City Attorney, and John L. Bland, Deputy City Attorney, Attorneys for Respondent; Wyman G. Reynolds, Attorney for Appellant.

[fol. 79] IN MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

DOCKET ENTRIES

Aug. 28, 1939. Complaint filed, sworn to by Mrs. George Farley charging the Defendant with having on Jul. 22, 1939 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Viol. Sec. 3 Chap. 390 Stats. 1933. Warrant Issued. $500-Bail set.

Aug. 28, 1939. Cause called. Judge Galbreth presiding. Both parties ready. People represented by Walter C. Allen (D. C. A.). Defendant represented by counsel. Defendant in court, duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant with counsel in open court each personally demands jury trial. Jury trial set for Sep. 11, 1939 at 9:30 A. M. in Div. 7. Bail Set at $200. Defendant Committed.

Sep. 11, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant represented by W. G. Reynolds. Trial by jury waived by consent of plaintiff, and of defendant personally and his counsel in open court. Witnesses [fol. 80] sworn and examined for the People: Mrs. Geo. Farley, Mrs. Belle Aldridge, Edna O'Dell, B. McClure. Witness sworn and examined for the Defendant: E. W. Thompson. Exhibits filed: People's Exhibit "A" (Photo). Defendant's Exhibit #1 (Agreement). Both sides rest.

Sep. 11, 1939. Cause continued to Sep. 15, 1939 at 3 P. M. for further trial.

Sep. 15, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman

(D. C. A.). Defendant in court in Pro. Per. Cause continued to Oct. 16, 1939 at 2 P. M. for further trial.

Oct. 16, 1939. Transferred to Div. 8 for trial.

Oct. 16, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Points and authorities having been filed—Cause continued to Oct. 25, 1939 at 2 P. M. for further trial.

Oct. 25, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. By stipulation and with consent of defendant personally, cause continued to Oct. 30, 1939 at 1:30 P. M. for further proceedings.

Oct. 30, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Cause further argued. Defendant adjudged [fol. 81] guilty of the offense charged. Cause continued for sentence to Nov. 3, 1939 at 2 P. M. Defendant released on his own recognizance.

Nov. 3, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Motion for a new trial denied. Referred to Probation Officer on motion of Court for investigation and report. Continued for probation hearing and sentence to Nov. 16, 1939 at 2 P. M.

Nov. 16, 1939. Transferred to Div. 5 for further proceedings before Judge Walters.

JUDGMENT

Nov. 16, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by E. Leighton (D. C. A.). Defendant in court and represented by Wyman Reynolds. Probation report filed. Probation granted. Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense Violation of Section 3 Chapter 390 Statutes of 1933 the said E. W. Thompson be fined in the sum of 250 dollars and that in default of the payment of said fine on or before 5 o'clock

P. M. of Nov. 16, 1939 the said E. W. Thompson be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied, not exceeding 50 days, and that the defendant be discharged on payment of such portion of said fine as shall not have [fol. 82] been satisfied by imprisonment at the rate above prescribed. It is further ordered, that the execution of sentence be suspended and that the defendant be placed on probation for 1 year subject to the following terms of probation: To report to Probation Officer as directed and to be prohibited from the illegal sale of transportation during period of probation.

Nov. 16, 1939. Written Notice of Appeal filed. Defendant released on his own recognizance.

Nov. 21, 1939. Statement on Appeal filed.

Nov. 27, 1939. Affidavit and Order granting to Dec. 8, 1939 to file respondent's proposed Amendments to Appellant's proposed Statement on Appeal filed.

Dec. 7, 1939. Respondent's proposed Amendments to Appellant's proposed Statement on Appeal and Affidavit of service by mail filed.

Dec. 7, 1939. Hearing to settle Statement on Appeal set for Dec. 18, 1939 at 1:45 P. M. in Div. 5.

Dec. 18, 1939. Cause called. Judge Walters presiding. Both parties ready. People represented by D. M. Hoffman (D. C. A.). Defendant in court and represented by W. G. Reynolds. Settlement of Statement on Appeal submitted.

Mar. 4, 1940. Respondent's proposed Amendments to Appellant's Statement on Appeal are allowed. Appellant to engross Statement.

Mar. 19, 1940. Court's corrected Statement on Appeal filed.

Mar. 21, 1940. Files on Appeal transmitted to Superior Court.

[fol. 83] I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named case.

Urban F. Emme, Clerk of the Municipal Court, of Los Angeles City, in said County and State, by Katherine Christensen, Deputy.

Dated: Nov. 8, 1940.

[fol. 84] CLERK'S CERTIFICATE

I, L. E. Lampton, County Clerk, and ex-officio clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that I have compared the foregoing transcript with the original documents on file herein, in this office, and that the same contain a full, true, and correct copy of the Complaint, Notice of Appeal, Statement on Appeal, Appellant's Points and Authorities filed Mar. 28, 1940, Respondent's Points and Authorities filed Mar. 28, 1940, Memorandum Opinion of Jun. 4, 1940, Respondent's petition for rehearing filed Jun. 10, 1940, Order granting rehearing of Jul. 3, 1940, Memorandum Opinion on Rehearing dated Oct. 15, 1940, Respondent's petition for rehearing filed Oct. 22, 1940, Order denying rehearing dated Oct. 24, 1940, Certificate of Trial Court, Order of the Superior Court staying proceedings, and Praecipe and Stipulation, together with the endorsements on said documents as the same now appear on file in this office.

I further certify that the foregoing copy of the docket record was duly certified and delivered to me by the Clerk of the Municipal Court of the City of Los Angeles.

I further certify that People's Exhibit A (photo) and Defendant's Exhibit 1 (agreement) were never transmitted [fol. 85] to the Appellate Department as part of the record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the Superior Court, this 15th day of November, 1940.

L. E. Lampton, County Clerk, By J. B. Williams, Deputy, Clerk of the Appellate Department. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1941

The petition herein for a writ of certiorari to the Appellate Department of the Superior Court, Los Angeles County, State of California, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 8 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES AND BRIEF IN SUPPORT THEREOF.

RAY L. CHESEBRO,
FREDERICK VON SCHRADER,
JOHN L. BLAND,
BOURKE JONES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the People of the State of California for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The case presents a question relative to a State regulatory statute affecting interstate commerce. In the Municipal Court of the City of Los Angeles, E. W. Thompson was found guilty of a misdemeanor by reason of his having

engaged in the business of a motor carrier transport agent without a license from the California Railroad Commission, as required by Section 3 of the California Statutes of 1933, Chap. 390, p. 1011 (R. 1, 7-8, 45). See page 19 for statute.)

The facts upon which the defendant Thompson was convicted are not in dispute and are very brief. In substance, they are: that Mr. Thompson conducted a business under the name of the Coast-to-Coast Travel Bureau, in the City of Los Angeles (R. 3). The owner of a private automobile who intended to make a trip to San Antonio, Texas, on business of his own, desired to take passengers with him to help defray part of the expense of the trip (R. 5). The defendant Thompson agreed to secure passengers for the owner of the automobile and the next day did secure four women passengers who desired to go to Dallas, Texas (R. 5, 6, 7). The owner of the car picked up the passengers and their luggage at the defendant's place of business, it being his intention to drive first to Dallas with his passengers and then to continue on to San Antonio (R. 6). The owner of the car was not in the business of transporting persons for hire and had never before transported any persons for compensation (R. 5-6).

The defendant had secured the four passengers through another person who apparently conducted a similar business, and who had booked the four persons for the trip and fixed the rate for the transportation (R. 6-7). The defendant sent a car to this other person's place of business to bring the passengers to his place of business (R. 7). The fare for each passenger was $11.00, and the defendant collected this sum from each of the passengers, turned over $7.00 to the owner of the car and retained $4.00 as his fee for securing the passengers, $3.00 of which he paid to the person who conducted the other travel bureau through which the passengers were secured; in all, the defendant collected

$44.00; paid $28.00 to the owner of the car; $12.00 to the person who sent him the business; and retained $4.00, or $1.00 per passenger, for himself (R. 7.).

Defendant's Contention.

The defendant contended that his activities constituted engaging in interstate commerce and that consequently he could not be required to obtain a license from the California Railroad Commission and post a bond as required by the statute (R. 41). The Municipal Court ruled on the contention adversely to the defendant and on the appeal by defendant of his conviction the Appellate Department of the Superior Court sustained the defendant's contention in this regard and reversed the judgment of the Municipal Court on the authority of the decision of this Honorable Court rendered in *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34, 71 L. Ed. 524 (R. 33-35).

B.

Basis of Jurisdiction of United States Supreme Court to Review the Judgment.

1. Statutory Provisions.

The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to issue a writ of certiorari in this cause is Judicial Code, Section 237 (b) [28 U. S. C. A., § 344 (b)], the relevant portions of which are as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn

in question * * * the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

2. THE STATUTE OF THE STATE, THE VALIDITY OF WHICH IS INVOLVED.

The statute of the State, the validity of which as applied to the facts of the case was denied by the Appellate Department of the Superior Court, the highest court in the State having jurisdiction of the cause, is Chapter 390 of the Statutes of 1933, page 1011, as amended by Chapter 665, Statutes of 1935, page 1833, set forth in full commencing at page 19 (Appendix to this petition), the pertinent portions of which may be summarized as follows:

Title.

An Act to provide for the regulation, supervision and licensing of motor carrier transportation agents.

Legislative Declaration for the Necessity of the Act.

Public welfare requires the regulation and control of persons who hold themselves out to act as intermediaries between the public and intrastate motor carriers of passengers who are not required by law to obtain certificates of public convenience and necessity from the California Railroad Commission, and that as to interstate motor carriers public welfare requires the same regulation and control of such persons until such time as Congress shall act in the matter.

Definition—Application of the Act.

1. *Motor Carrier Transportation Agent.* One who sells or offers for sale or negotiates for transportation over the public highways of the State of California.

2. *Application.* The act has no application to transportation of persons without compensation or the transportation of farm workers or employees of nonprofit cooperative associations, and other instances having no relation to the issues presented in this cause.

The act specifically provides that it shall be applicable regardless of whether the transportation sold or offered to be sold is interstate or intrastate.

License Requirement.

It is unlawful to act in the capacity of a motor carrier transportation agent without first obtaining a license from the California Railroad Commission, the fee for which is $1.00 per year, and the application therefor shall be duly verified and be in such form and contain such information as the Railroad Commission may from time to time require, and the Railroad Commission shall not issue such a license if it determines that the applicant is not a fit and proper person to be licensed or the motor carriers for whom applicant proposes to sell transportation are not complying with the laws of the State or of the United States or the general orders of the California Railroad Commission applicable to the operations of said motor carriers. The license shall not be issued until a surety company bond in the sum of $1,000 has been filed by the applicant as principal, which bond shall be payable to the State of California, or to any person to whom the applicant shall have furnished or provided transportation, and shall be conditioned upon the faithful performance by the motor carrier for whom the

applicant is licensed to act of the contract or agreement of transportation negotiated by the licensee, and the honest and faithful performance by applicant of any undertaking as a licensed motor carrier transportation agent under the act.

There is also a provision for a blanket bond to be filed by corporations to cover the acts of persons acting as agents or employees of the corporation, the amount of said bond being fixed in the discretion of the Commission in a sum not in excess of $25,000.

Suspension or Revocation of License.

The Railroad Commission may suspend or revoke a license if it shall determine that the licensee is not a fit and proper person to hold the same or has engaged in false advertising and false representations in violation of the laws of the State of California, or any political subdivision thereof, or has sold or offered for sale or negotiated for sale transportation by any carrier that under the laws of the State of California is conducted in a manner contrary to the public interest or without proper authority or in violation of the provisions of this act, or the general orders, rules and regulations of the Railroad Commission pertaining thereto.

Records To Be Kept By Agents.

Motor carrier transportation agents are required to keep, for a period of two years, an exact and permanent record of all transactions had by them as such agents, including the amount paid to such agent by each person transported, point of destination, and name of the person, firm or corporation acting as motor carrier, which record shall at all times be open to inspection by any officer or agent of the state, county or city and county within the State.

Penalty for Operation Without License.

Fine of not to exceed $500, or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the discretion of the court, or, if a corporation, by a fine not to exceed $2500; and for a second and subsequent offense a fine of not to exceed $1000, or imprisonment in the county jail or state prison for a term not to exceed one year, or both, or, if a corporation, a fine not to exceed $5000.

Penalties for Violation By Licensee.

Fine not to exceed $500, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and, in addition thereto, revocation of license by the California Railroad Commission.

3. Date of Judgment.

The final judgment of the Appellate Department of the Superior Court sought to be reviewed was rendered on October 15, 1940 (R. 35). Petitioner filed a petition for rehearing therein on October 22, 1940, which petition for rehearing was duly considered and denied by the court on October 24, 1940 (R. 40). Prior to the judgment of October 15, 1940, the court rendered judgment reversing the defendant's conviction (R. 18; Appendix, p. 31). However, petitioner filed a petition for rehearing (R. 20), which was granted and the earlier judgment vacated (R. 32).

4. Nature of the Case and Rulings of the Appellate Department of the Superior Court.

I.

Nature of the Case.

The case is a criminal prosecution for a misdemeanor arising out of the violation of a State statute, which was commenced by the filing of a complaint in the Municipal

Court of the City of Los Angeles charging the defendant with having engaged in the business and acted in the capacity of a motor transportation agent without having secured a license from the Railroad Commission of the State of California so to do (R. 1). When the defendant was arraigned on the complaint he pleaded not guilty to the charge (R. 44). No written plea was entered for the reason that under the practice of the State pleas are entered orally in criminal cases. (Cal. Penal Code, § 1017.) Upon the trial the evidence introduced by the people showed that the defendant operated a travel bureau and had sold transportation from Los Angeles, California, to Dallas, Texas, without having a license to act from the California Railroad Commission (R. 6-7). The defendant contended that he could not be found guilty under the facts disclosed by the evidence even though he did not have a permit so to do from the State Railroad Commission as he was engaged in interstate commerce and that the statute, if made applicable to the facts as disclosed on the trial, would be a burden upon interstate commerce and would therefore be void (R. 41). The Municipal Court declined to uphold defendant in this contention and found him guilty of the offense charged (R. 45). The defendant thereupon took an appeal of his conviction to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles (R. 2), which, under the constitution and laws of the State of California, is the court of last resort for the review of judgments of the Municipal Court of the City of Los Angeles. (See cases cited at p. 10 of this petition.)

II.

Rulings of the Appellate Department of the Superior Court.

In reversing the judgment of conviction of the defendant entered in the Municipal Court, the Appellate Department

of the Superior Court stated in its memorandum opinion (attached hereto), commencing at page 27:

1. "That whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again," and that "the contract made with the complaining witness, therefore, was in the field of interstate commerce."

2. That the State of California cannot by statute require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce, even though Congress has not as yet undertaken to enact legislation affecting such matter.

3. That the case of *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34, 71 L. Ed. 524, controls in this matter and requires that the judgment of conviction be reversed on the ground that under the *Di Santo* case the particular burden involved in the case at bar has been adjudged to be one that a state may not impose on interstate or foreign commerce.

5. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

The Judgment Is Final.

1. The existence of jurisdiction is to be tested by the substantial operation of the judgment.

United States v. *Thompson*, 251 U. S. 407, 412, 64 L. Ed. 333, 341.

2. The judgment finally determines that the defendant is not required to comply with the statute of the State in sell-

ing transportation from California to points outside the State.

United States v. *Oppenheimer*, 242 U. S. 85, 88, 61 L. Ed. 161, 164.

3. A judgment of dismissal which conclusively determines the rights of the petitioner is final.

City of Waco v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140, 143, 79 L. Ed. 244;

United States v. *Three Friends*, 166 U. S. 1, 49, 41 L. Ed. 897, 913.

4. The fact that there might be some further proceedings upon an entirely collateral or independent matter does not detract from the finality of the judgment.

Knox National Farm Loan Assn. v. *Phillips*, 300 U. S. 194, 197, 81 L. Ed. 599, 602;

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 16, 76 L. Ed. 136, 142;

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30, 31, 60 L. Ed. 507, 510.

II.

The Appellate Department of the Superior Court Is One of Last Resort.

Kim Young v. *California* (*Schneider* v. *State, Town of Irvington*), 308 U. S. 147, 154, 84 L. Ed. 155, 161;

Carlson v. *California*, 310 U. S. 106, 111, 84 L. Ed. 1104, 1107;

People v. *Reed* (1936), 13 Cal. App. (2d) 39, 40.

III.

The Writ of Certiorari Will Issue upon the Petition of a State or Its Agencies Where the Claim of Invalidity of the State Statute Is Based upon Conflict with Authority Vested in the Federal Government and Such Claim Is Sustained by the State Court.

State Tax Commission v. *Van Cott*, 306 U. S. 511, 513, 83 L. Ed. 950, 952;
Virginia v. *Imperial Coal Sales Co.*, 293 U. S. 15, 16, 17, 79 L. Ed. 171, 173;
Minnesota v. *Blasius*, 290 U. S. 1, 5, 78 L. Ed. 131, 133;
McGoldrick v. *Berwind-White Etc. Co.*, 309 U. S. 33, 84 L. Ed. 565.

IV.

The Judgment of the Court Was Based upon an Asserted Conflict of the State Statute with a Power Vested in the Federal Government.

State Tax Commission v. *Van Cott* (*supra*), 306 U. S. 511, 514, 83 L. Ed. 950, 952.

V.

Section 237 of the Judicial Code Makes No Distinction between Civil and Criminal Cases in Respect to the Revision of the Judgments of State Courts by the Supreme Court of the United States.

Twitchell v. *Commonwealth of Pennsylvania*, 74 U. S. 321, 324, 19 L. Ed. 223.

6. GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

I.

If this Honorable Court is unable to say that every question is foreclosed by prior decisions and clearly not debatable, it cannot be said that no question of substance is presented.

Chesebro v. *Los Angeles County Flood Control District*, 306 U. S. 459, 463, 83 L. Ed. 921, 925;

Hamilton v. *University of California*, 293 U. S. 245, 258, 79 L. Ed. 343, 350.

II.

Until Congress, under the commerce power, adopts legislation inconsistent with it, a State statute in the nature of a police regulation requiring a broker whose business has a local situs within the State, though he deals in matters of interstate commerce, to secure a license upon an application showing his character, responsibility and good faith in conducting such business, and requiring a bond to be posted, conditioned upon the honest conduct of his business, is a valid State statute, as whatever effect as the regulation has upon interstate commerce is indirect and incidental.

Hartford Accident & Indemnity Co. v. *Illinois*, 298 U. S. 155, 158, 80 L. Ed. 1099, 1102.

III.

A State regulatory statute is not void as imposing a burden upon interstate commerce where the burden imposed is an inseparable incident of the exercise of legislative authority which, under the Federal Constitution, has been left to the States.

Ziffrin v. *Reeves*, 308 U. S. 132, 141, 84 L. Ed. 128, 136.

IV.

In the absence of the exercise of Federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests, even though interstate commerce is directly affected.

Eichholz v. *Public Service Commission,* 306 U. S. 268, 274, 83 L. Ed. 641, 646;

Kelly v. *Washington,* 302 U. S. 1, 10, 82 L. Ed. 3, 10.

V.

Congress, in enacting the Federal Motor Carrier Act of 1935, did not intend to supersede State police regulations established for the protection of the public.

H. P. Welch Co. v. *New Hampshire,* 306 U. S. 79, 85, 83 L. Ed. 500, 505;

Maurer v. *Hamilton,* 309 U. S. 598, 614, 84 L. Ed. 969, 980;

See, also:

South Carolina State Highway Department v. *Barnwell Bros.,* 303 U. S. 177, 189, 82 L. Ed. 734, 741.

VI.

In the absence of Federal legislation covering the subject, the State may impose, even upon vehicles using the highways exclusively in interstate commerce, nondiscriminatory regulations for the purpose of insuring the public safety and convenience.

Sprout v. *South Bend,* 277 U. S. 163, 169, 72 L. Ed. 833, 836;

Bradley v. *Public Utilities Com.,* 289 U. S. 92, 95, 77 L. Ed. 1053, 1056.

VII.

The transportation sold by persons in the business in which the respondent Thompson was engaged is accom-

plished by drivers of automobiles who are operating independently and who often have no financial responsibility, and the only effective way of assuring the performance of their contracts is through control of the licensed agents, and the statute enacted to meet the known conditions prevailing on the highways of California at the present time is a valid exercise of the police powers of the State.

Finn v. *Railroad Commission* (Three-Judge Statutory Court), 2 Fed. Supp. 891, 894.

VIII.

Statutes of the type involved in this case have been held by State courts to only incidentally affect interstate commerce and that since they are well within the reasonable exercise of the police power of the State they are valid.

Bowen v. *Hannah*, 167 Tenn. 451, 463, 71 S. W. (2d) 672, 676;

Francis v. *Allen*, 54 Ariz. 377, 386, 96 Pac. (2d) 277, 281;

Martin v. *Railroad Com.* (Tex. Civ. App.), 93 S. W. (2d) 1155, 1159.

7. Stage In Proceedings and Method of Raising Federal Questions.

At the close of the evidence on the trial of the action in the Municipal Court the defendant urged, by way of argument as reason for the rendition of a judgment of not guilty, that the statute which he was charged with violating was, as applied to him, unconstitutional and therefore void, for the reason (1) that it constituted a burden upon interstate commerce, in violation of the Constitution of the United States, and (2) that Congress had enacted a law governing and regulating the operation of motor carriers engaged in interstate commerce and that therefore the State of California was without power to enforce the statute which he was charged with having violated (R. 41).

After the defendant was found guilty and judgment entered accordingly, he appealed to the Appellate Department of the Superior Court (R. 2) and, in substance, urged in his points and authorities as ground for reversal of his judgment of conviction in the Municipal Court that the states have no power to pass laws regulating commerce among themselves as under Article I, Section 7, of the Constitution of the United States that power is vested exclusively in Congress and that the requirement of the State statute, that before a person is authorized to sell interstate transportation tickets or transportation he must secure a license from the State Railroad Commission and post a bond and otherwise submit generally to State regulations, is unconstitutional and void as it invades the exclusive field of Congress (R. 10-13).

C.

The Questions Presented.

I.

Where Congress has not as yet enacted legislation upon the subject, is a State prohibited from enacting a police regulatory statute for the supervision and control of those engaged in acting as intermediaries in arranging for and selling transportation from points within the State to destinations outside the State by means of motor carriers not subject to the authority of the Interstate Commerce Commission or other Federal agency?

II.

Is an unconstitutional burden placed upon interstate commerce by compelling compliance with a state statute which requires those who sell transportation by means of casual motor carriers not subject to the authority of the Interstate Commerce Commission or other Federal agency to secure

a license so to do from the State by making application therefor, showing their fitness to conduct such a business, and filing a bond conditioned upon the faithful performance of the contract of carriage by such licensees and the carriers who undertake the transportation?

D.

The Reasons Relied On for the Allowance of the Writ.

I.

The Appellate Department of the Superior Court decided a Federal question of substance not heretofore determined by this Honorable Court and has decided the question in a way which is probably not in accord with the applicable decisions of this Court.

II.

The question decided by the Appellate Department of the Superior Court is one of utmost importance to every State and to the Federal Government as well, as it involves the authority of the States to regulate and supervise a business which is fraught with great evil unless it is regulated and controlled so as to exclude irresponsible persons from engaging therein.

III.

In order to adequately protect the public against prevalent evils which have arisen from the unregulated conduct of so-called travel bureaus, transportation agents and the like, the proprietors of which arrange and sell tickets for transportation by casual or private motor vehicles between points in different States, it is highly necessary that this Honorable Court eliminate the confusion existing in the decisions of various State courts upon the question of the power of the several States to enact legislation upon this

matter, in view of the authority vested in Congress under the Constitution of the United States over matters of commerce between the States.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket, Superior Court No. Cr. A. 1692, Trial Court No. 93,602, "People of the State of California, plaintiff and respondent, vs. E. W. Thompson, defendant and appellant"; and that the said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PEOPLE OF THE STATE OF CALIFORNIA,
By RAY L. CHESEBRO,
FREDERICK VON SCHRADER,
JOHN L. BLAND,
BOURKE JONES,
Counsel for Petitioner.

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APPENDIX.

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State Statute Involved.

California Statutes of 1933, p. 1011, as amended by Statutes of 1935, p. 1833; Deering's General Laws, Act No. 5130c.

"An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof; and repealing an act entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, and all acts or parts of acts inconsistent with the provisions of this act.

"Sec. 1. The Legislature hereby declares that the public welfare requires the regulation and control of those persons, whether acting individually or as officers, commission agents or employees of any person, firm or corporation, who hold themselves out to act as intermediaries between the public and those motor carriers of passengers operating, as common carriers or otherwise, over the public highways of the State, for compensation, that are not required by law to obtain, or that have not obtained, a certificate from the Railroad Commission of the State of California declaring that public convenience and necessity require the operations of such motor carriers; further, that until such time as Congress of the United States shall act, the public welfare requires such regulation and control of such intermediaries between the public and interstate motor carriers as well as between the public and intrastate motor carriers.

"Sec. 2. A motor carrier transportation agent within the meaning of this act is a person who, acting either individually or as an officer, commission agent, or employee of a corporation, or as a member of a copartnership, or as a commission agent or employee of another person or persons, sells or offers for sale, or negotiates for or holds himself out as one who sells, furnishes or provides, transportation over the public highways of this State when such

transportation is furnished, or offered or proposed to be furnished, by a motor carrier as defined in this act.

"A motor carrier within the meaning of this act is any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, transporting, or offering or proposing to transport, as a common carrier or otherwise, persons for compensation over the public highways of the State of California, or any portion thereof.

"*Application of act.* This act shall not apply to the carriage, or proposed carriage, of any person, or persons, when no compensation for such carriage is paid, or offered or proposed to be paid, or requested or required to be paid, by, or on behalf of, a person, or persons, transported, or to be transported; nor to those engaged solely in the carriage or transportation to and from work, of employees engaged in farm work on any farm of the State of California, nor to those engaged solely in the carriage or transportation to and from work of employees of any nonprofit cooperative association organized pursuant to any of the laws of the State of California; nor to movements of persons wholly within the corporate limits of a single municipality; nor to transportation over a route wholly or partly within a National park where such transportation is sold in conjunction with or as part of a rail trip; provided, however, that the transportation of persons whereby there is paid, or requested or required to be paid, by, or on behalf of, the person, or persons, transported, a portion of the expense incurred in course of such transportation, shall be deemed transportation provided by a motor carrier within the meaning of this act.

"The provisions of this act shall apply regardless of whether such transportation so sold, or offered to be sold, is interstate or intrastate. (Amended by Stats. 1935, p. 1834.)

"Sec. 3. From and after sixty (60) days after this act becomes effective, it shall be unlawful for any person, firm or corporation to engage in the business, or act in the capacity, of a motor carrier transportation agent within the meaning of this act without first obtaining a license therefore.

No license shall be issued to any copartnership or corporation, it being the intent hereof to require each person acting as a motor carrier transportation agent, in this State, to be individually licensed therefor; provided, however, that if an applicant is an officer or commission agent or employee of a corporation, or a member of any copartnership, or a commission agent or employee of any person or copartnership, he shall so state in his application, and the corporation, copartnership, or person of which applicant is an officer, member, or employee, as the case may be, shall join in applicant's application and shall set forth therein the relationship between applicant and said person, copartnership and/or corporation so joining.

"Sec. 4. The Railroad Commission of the State of California is hereby vested with authority to administer this act, with full power to regulate and control the issuance and revocation of licenses to be issued under the provisions of this act, and to perform all other acts and duties provided in this act and necessary for its enforcement.

"Sec. 5. All fees charged and collected under this act shall be deposited at least once a month in the State treasury to the credit of the Railroad Commission and in augmentation of the current appropriation for the support of the Railroad Commission and may be expended by the Railroad Commission for the administration of this act.

"Sec. 6. An application for a license as a motor carrier transportation agent shall be made in writing to the Railroad Commission, which application shall be duly verified and shall be in such form and contain such information as the Commission may from time to time require.

"The Railroad Commission shall have power, with or without hearing, to issue said license as prayed for, or to refuse to issue the same, or to issue it for the partial exercise of the privilege sought. No license shall be issued to an applicant when, with or without hearing, the Railroad Commission shall determine that (1) the applicant is not a fit and proper person to receive the same, or (2) the motor carriers for whom applicant proposes to sell transportation

have not complied, and are not then and there complying and do not propose to comply, with State and/or Federal Laws, and/or all general orders of the Railroad Commission of the State of California, applicable to the operations of said motor carrier.

"The order of the Railroad Commission granting to any applicant a motor carrier transportation agent's license shall set out the name of the motor carriers for whom said agent is licensed to sell.

"*Display of license.* In the location at which applicant is licensed to sell transportation, there shall be displayed in a prominent place a certificate setting forth the name of the licensee and such other matter and things as the commission may require.

"Sec. 7. The fees for licenses, and each renewal thereof, shall be one dollar ($1) per year, or fraction thereof. All applications for licenses shall be accompanied by the fee as herein provided and all licenses, subject to the provisions for renewal, which the Railroad Commission shall prescribe, shall expire on December 31 of each year. (Amended by Stats. 1935, p. 1834.)

"Sec. 8. No license shall be issued unless the applicant therefor shall provide a good and sufficient bond in the sum of one thousand dollars ($1000), which bond shall be filed by such applicant as principal and by some solvent surety company, authorized to do business in the State of California, as surety, payable to the State of California, and/or any person, or persons, for, or to whom, applicant may, or shall, furnish or provide transportation, and shall be conditioned: (1) upon the faithful performance, by the motor carrier or motor carriers for whom applicant is licensed to act, of the contract or agreement of transportation negotiated by the licensee, and (2) the honest and faithful performance by applicant of any undertaking as a licensed motor carrier transportation agent under this act; provided, however, that if any corporation, copartnership, or person of which applicant is an officer, member, commission agent or employee, as the case may be, shall join in applicant's application as provided in section 3 hereof, applicant

shall be deemed to have complied with the provisions of this section if applicant shall provide, or there shall, theretofore, have been filed with the Railroad Commission, a good and sufficient bond in a sum to be fixed by the Railroad Commission, not exceeding twenty-five thousand dollars ($25,000), executed by the corporation, copartnership, or person, joining in such application, as principal, and by some solvent surety company, authorized to do business in the State of California, as surety, payable to the State of California, and/or any person, or persons, for , or to whom, any officer, member, commission agent or employee of said principal, licensed under the provisions of this act may, or shall, furnish or provide transportation, conditioned: (1) upon the faithful performance, by the motor carrier or motor carriers for whom any officer, member, commission agent, or employee of said principal is licensed to act, of the contract or agreement of transportation negotiated by the licensee, and (2) the honest and faithful performance, by any such officer, member, commission agent or employee so licensed, of any undertaking as a licensed motor carrier transportation agent under this act.

"Sec. 9. No license issued under the provisions of this act shall give authority, to do any act for which the license is issued, to any person, other than the licensee, and such license shall not be transferable or assignable. No license issued thereunder shall authorize the licensee to do business except in the location stipulated in the license.

"Sec. 10. The commission may suspend or revoke any license theretofore issued if it shall determine that the licensee is not a fit and proper person to hold the same, or if the commission shall determine that the licensee, in acting as such motor carrier transportation agent, has engaged in false advertising and false representation in violation of the laws of this State, or any political subdivision thereof, or has sold, offered for sale, or negotiated for sale, transportation by any carrier that under the laws of this State is conducted in a manner contrary to the public interest, or without proper authority, or in violation of the provisions of this act or the general orders, rules and regulations of the Railroad Commission pertaining thereto.

"Sec. 11. It shall be the duty of all motor carrier transportation agents to maintain and keep, for a period of two (2) years, an exact and permanent record of all transactions had by them as such agents, including the amount paid to such agent by each person transported, point of destination, and the name of the person, firm or corporation acting as motor carrier. The records hereby required to be kept shall at all times be open to inspection by any officer or agent of the State, county, or city and county within the State.

"Sec. 12. All powers heretofore, or hereafter to be vested in the Railroad Commission of the State of California, as relates to hearing and determining matters presented to it, are made applicable to the proceedings under the provisions of this act.

"Sec. 13. This act shall not have the effect to release or waive any right of action by the State, Railroad Commission, or any person or corporation, for any fine, penalty or forfeits which may have arisen or accrued, or may hereafter arise or accrue, under any laws of this State. All penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to, or affect the recovery of, any other penalty or forfeit, or be a bar to any criminal prosecution, or be a bar to the exercise of the commission of its powers to punish for contempt.

"Sec. 14. Any person, firm or corporation, shall be understood to be acting as a motor carrier transportation agent within the meaning of this act who shall (1) orally or by card, circular, pamphlet, newspaper, radio, sign, billboard, or any other way, advertise himself, or itself as one who sells, furnishes, negotiates for, or provides transportation over the public highways of this State when such transportation is furnished or offered, or proposed to be furnished, by motor carriers as defined in this act; (2) manage or conduct as manager, conductor, agent, proprietor, leasor, lessee, ticket collector, or otherwise, a place where transportation is, or is offered, or proposed to be, sold, furnished, negotiated for, or provided by a motor carrier as defined in this act; (3) aid and abet, or without being pres-

ent shall have advised and encouraged any person, firm or corporation in acting as, or to act as, a motor carrier transportation agent. One act of the nature herein set forth shall constitute a person, firm or corporation doing or committing such act, a motor carrier transportation agent within the meaning of this act. It is hereby made the duty of any officer arresting any person for violation of this act, to take, and keep in his custody for use as evidence, any materials or indicia used by said person so arrested, for the purpose of advertising said persons acting as, or desiring to act as, a motor carrier transportation agent.

"*Burden of proof.* Any person who may, or shall, be charged with, or complained of as, acting as a motor carrier transportation agent without a license as herein provided, shall bear the burden of proof of proving as a matter peculiarly within the knowledge of the person so charged or complained of: (1) that such person, firm or corporation so charged or complained of is a licensed motor carrier transportation agent; and (2) that the motor carrier or motor carriers for whom such person, firm or corporation is, or has been, acting, or proposed to act, as an agent, as charged or complained of, is not a motor carrier within the meaning of this act.

"Sec. 15. The Railroad Commission may prefer a complaint for violation of this act before any court of competent jurisdiction and said commission and its counsel, or other official representatives, may assist in presenting facts at the trial. It shall be the duty of the district attorney of each county in this State to prosecute all violations of the provisions of this act in their respective counties in which such violations occur, either with or without request of said commission.

"'Sec. 16. Any person, firm or corporation, acting as a motor carrier transportation agent within the meaning of this act without a license as herein provided shall, upon conviction of a first offense thereof, if a person, be punished by a fine of not to exceed five hundred dollars ($500), or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the dis-

cretion of the court; or, if a corporation, may be punished by a fine of not to exceed two thousand five hundred dollars ($2,500); and for a second and subsequent offense shall, upon the conviction thereof, if a person, be punished by a fine of not to exceed one thousand dollars ($1,000), or by imprisonment in the county jail or State prison for a term not to exceed one year, or by both such fine and imprisonment in the discretion of the court; or, if a corporation, may be punished by a fine of not to exceed five thousand dollars ($5,000).

"Sec. 17. Any person duly licensed as a motor carrier transportation agent, who shall violate any of the provisions of this act shall, upon conviction thereof, be punished by a fine not to exceed five hundred dollars ($500), or by imprisonment in a county jail not to exceed six months, or by both such fine and imprisonment in the discretion of the court; and in addition thereto, the license as motor carrier transportation agent theretofore issued shall be revoked by the Railroad Commission in the manner herein provided.

"Sec. 18. The term 'commission,' or 'Railroad Commission,' when used in this act, means the Railroad Commission of the State of California.

Same as Sec. 21, post.

"Sec. 19. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

"Sec. 20. Chapter 638, Statutes of 1931, entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, is hereby repealed.

"Sec. 21. The term 'commission' or 'Railroad Commission' when used in this act means Railroad Commission of the State of California."

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 1692.

Trial Court No. 93602.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant.

MEMORANDUM OPINION ON REHEARING.

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed.

The complaining witness paid for what she believed to be, and so far as we are aware proved to be, transportation from Los Angeles to Dallas, Texas. No one so far has questioned what seems to us to be an obvious conclusion, that whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again. The contract made with the complaining witness, therefore, was in the field of interstate commerce.

Who was it that undertook to transport the complaining witness (and three others) to Texas? In an endeavor to distinguish the case under review from *Di Santo* v. *Pennsylvania* (1927) 273 U. S. 34, 71 L. ed. 524, counsel for the People picture our case as one where the defendant

"secures orders * * * upon his own account * * * he is an independent contractor." The evidence supports this conclusion, i. e., that the defendant as principal undertook to transport the complaining witness to Texas. If so, the defendant would appear as the motor carrier and not as a motor carrier transportation agent, and the judgment of conviction would have to be reversed on that ground. The evidence, however, also supports the conclusion, doubtless reached by the trial judge, that the owner and driver of the automobile was the motor carrier, the principal in the transaction, and that the defendant acted as his agent in securing passengers and in collecting compensation for the passage. On this view of the evidence, the defendant was proven guilty of the charge brought against him, for admittedly he did not have the license required by the act.

Can the act (Act 5130c, Deering's Gen'l Laws) validly do that which it has expressly attempted to do until federal action takes the field, i. e., require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce? In answering this question we are gently admonished by counsel to follow cases which are in point rather than those which involve facts far afield. So it is that we follow *Di Santo* v. *Pennsylvania*, referred to above, rather than *Hartford &c Co.* v. *People* (1936) 298 U. S. 155, 80 L. ed. 1099; *Milk Control Board* v. *Eisenberg Farm Products* (1939) 306 U. S. 346, 83 L. ed. 752; *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 84 L. ed. Adv. Op. 343; *Maurer* v. *Hamilton* (1940) 84 L. ed. Adv. Op. 671, each of which deals with a statute affecting interstate commerce at points quite removed from that where our statute presses. The Di Santo case, however, is much in point. There an individual had been convicted of acting as ticket agent without the license and bond required of one selling tickets on behalf of steamship companies. The license and bond were not required of those actually furnishing the transportation, nor of their officers or employees, nor were they parties to the action. The judgment of conviction was reversed, however, because, the federal supreme court held, (1) to require a license and bond of one who was the ticket agent of a company engaged in for-

eign commerce was to place a burden on foreign commerce which a state may not impose, and (implicit in the decision), (2) of the statute's invalidity the ticket agent may complain.

It may well be that the next time this question is presented to the supreme court a different answer will be given. It is within their power, not ours, to reverse their decisions. It may be that they would differentiate our statute from that involved in the Di Santo case because the latter dealt with foreign commerce, while our statute deals with interstate commerce. We find in the words granting power to the Congress, "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, sec. 8, U. S. Const.) no recognition of a greater immunity from state legislation affecting foreign commerce than that affecting interstate commerce. We recognize that many state-imposed burdens on and many state-created conflicts with interstate commerce have been permitted. But the particular burden involved here has been adjudged one that a state may not impose. We feel bound by the supreme court's determination of the question.

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action. If, as may be, the People are in a position to prove that the defendant acted as ticket agent for motor carriers doing an intrastate business, the dismissal may be made for the purpose of filing an amended complaint.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated October 15, 1940.

BISHOP,
Judge.

We concur:
SHAW,
Presiding Judge,
SCHAUER,
Judge.

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IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

(This Opinion Vacated.)

Superior Court No. CR A 1692.

Trial Court No. 93602.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant.

MEMORANDUM OPINION.

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed with directions.

Two conclusions are inescapable. In the first place the evidence supports the conviction; appellant did violate the terms of the statute (Act 5130c, Deering's Gen'l Laws 1937) that prohibits an unlicensed person from acting in the capacity of a motor carrier transportation agent. He sold transportation over the highways of this state, which a Mr. McClure had offered to furnish. He (the defendant) thus acted in the capacity of a motor carrier transportation agent under sections 2 and 14 of the act, if Mr. McClure

was a motor carrier. That Mr. McClure was a motor carrier, within the definition of that term in section 2 of the act, follows from the unadorned fact that he offered to transport persons for compensation over the highways of this state.

It also appears, however, that the only transportation Mr. McClure offered to furnish, and the only transportation the defendant sold, within the confines of this case, was from Los Angeles, California, to Dallas, Texas. The requirement of the act (sections 3 and 8) that no one may act as agent in selling transportation without securing a license, to obtain which a one thousand dollar bond must be provided, in so far as it is attempted to be applied to a purely interstate operation such as that involved here, is a direct not merely incidental burden on interstate commerce, beyond the power of a state to impose. The case of *Motor Transit Co. v. Railroad Commission of California* (1936) 15 Fed. Supp. 630, so held with respect to the statute we are considering, and as pointed out by Judge Wilbur (p. 633), "The decision of the Supreme Court in *Di Santo* v. *Commonwealth of Pennsylvania*, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524, is decisive upon that question."

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated June 4, 1940.

BISHOP,
Judge.

I concur.

SCHAUER,
Judge.

I concur. This case is distinguishable from that involved in *Wintjen* v. *City of L. A.*, L. A. Superior Court No. 447423. There, according to the complaint considered, the plaintiff

sold no tickets or transportation and collected no money in payment for transportation, but merely conducted a sort of information bureau where those desiring transportation and those willing to furnish it might be brought together so that they could make their own arrangements. It was held that such a business did not so directly affect interstate commerce as to remove it from the power of the state unless Congress should act upon it. To that decision I still adhere. See *Hartford Acc. etc. Co.* v. *Illinois* (1936), 298 U. S. 155, 80 L. Ed. 1099. In this case, however, the defendant directly sold the transportation to those desiring it and collected the price thereof. While he did not issue anything denominated "tickets," he did give the prospective passengers receipts which served the same purpose and were taken up by him when transportation began. I can see no way to escape the application of the authorities cited in the foregoing opinion to such a case. But the statute is not thereby rendered invalid as a whole. It may still operate on intra-state transportation and in cases which are like the Wintjen case in their facts.

SHAW,
Presiding Judge.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner respectfully presents this brief in support of its petition for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to review the judgment of that court rendered in the case entitled, "People of the State of California *v.* E. W. Thompson".

Opinions of the Court Below.

In rendering its first judgment reversing the conviction of respondent E. W. Thompson, the Appellate Department of the Superior Court delivered a Memorandum Opinion (R. 18). After granting petitioner's petition for rehearing (R. 32) the court again rendered a judgment of reversal and delivered a Memorandum Opinion on Rehearing (R. 33). Neither of these Memorandum Opinions will be published in any official reporting service; however, they will be kept on file in the office of the Clerk of the Court and

will be cited in subsequent cases if the questions of law to which they relate again come before the court.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A., § 344 (b)]. The date of the judgment which petitioner seeks to have reviewed is October 15, 1940 (R. 35). Thereafter, and within the time allowed by the Rules of Court governing petitions for rehearing in the Appellate Department of Superior Courts, petitioner filed a petition for rehearing (R. 35), which petition was duly considered and denied by the court on October 24, 1940 (R. 40).

Statement of the Case.

Respondent E. W. Thompson, the appellant in the court below, was charged, in the Municipal Court of the City of Los Angeles, with the commission of a misdemeanor in that he acted as a motor carrier transportation agent without first having obtained a license so to do from the California Railroad Commission, and that his act in so doing was in violation of Section 3 of the California Statutes of 1933, page 1011 (R. 1). The statute is set forth in full commencing at pag 19 (Appendix to the Petition) and is summarized commencing at page 4 of the petition itself. A complete statement of the case has been made in the petition in the summary statement of the matter involved (p. 1), and the statement of the nature of the case (p. 7). Therefore, in the interest of brevity, the facts of the case will not be repeated here, other than to state that the issue involved is whether the States, in the absence of legislation by Congress upon the subject, have power to control, by statutes of a police regulatory nature, persons engaged in the business of selling transportation to be furnished by unlicensed,

casual motor vehicle operators, where such transportation is to a destination outside the State.

Specifications of Error.

The court below erred in holding:

1. That the State of California, cannot, by statute, require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who, as an unlicensed and casual carrier, transports persons for hire by private passenger vehicle to destinations beyond the State, even though Congress has not as yet undertaken to enact legislation affecting such matter.

That the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524, holds that the States are without the power to enact legislation upon this subject and is applicable to the facts of this case and requires that the judgment of conviction of the defendant be reversed.

ARGUMENT.

Summary of the Argument.

POINT I.

IN ORDER TO PROTECT THE PUBLIC SAFETY AND WELFARE AND PREVENT FRAUD UPON THE PUBLIC, IT IS ESSENTIAL THAT THE BUSINESS OF ACTING AS AGENT OR BROKER FOR THE SALE OF TRANSPORTATION OF PERSONS BY MEANS OF PRIVATE PASSENGER MOTOR VEHICLES OPERATED CASUALLY BY UNLICENSED PERSONS BE REGULATED UNDER THE EXERCISE OF THE POLICE POWER.

POINT II.

THE DECISION OF THE COURT BELOW, HOLDING THAT EVEN IN THE ABSENCE OF LEGISLATION BY CONGRESS UPON THE SUBJECT THE STATES ARE WITHOUT POWER TO REGULATE MOTOR CARRIER AGENTS OR BROKERS IN SO FAR AS THEIR ACTS RELATE TO SELLING OR ARRANGING FOR TRANSPORTATION TO DESTINATIONS BEYOND THE STATE, IS

IN CONFLICT WITH DECISIONS OF THIS COURT APPLICABLE TO THE REGULATION OF TRANSPORTATION AND OTHER ACTS IN INTERSTATE COMMERCE CARRIED ON BY MEANS OF MOTOR VEHICLES.

POINT III.

THE MOTOR CARRIER ACT OF 1935 (CHAP. 8, INTERSTATE COMMERCE ACT, TITLE 49, U. S. C. A., §§ 301-327) EXCLUDES FROM ITS OPERATION THE CASUAL, OCCASIONAL OR RECIPROCAL TRANSPORTATION OF PASSENGERS IN INTERSTATE COMMERCE, FOR COMPENSATION, BY ANY PERSON NOT ENGAGED IN TRANSPORTATION BY MOTOR VEHICLES AS A REGULAR OCCUPATION OR BUSINESS.

POINT IV.

IT IS OF UTMOST IMPORTANCE THAT THIS HONORABLE COURT RENDER ITS DECISION UPON THE QUESTION OF THE RIGHT OF THE STATES TO REGULATE MOTOR CARRIER AGENTS OR BROKERS IN THE ABSENCE OF ACTION UPON THE PART OF CONGRESS, AS THE EXISTING CONFLICT IN THE DECISIONS OF THE COURTS OF THE VARIOUS STATES UPON THIS QUESTION SERIOUSLY HAMPERS EFFECTIVE REGULATION OF THIS BUSINESS, WHICH IS SO BADLY NEEDED FOR THE PROTECTION OF THE PUBLIC.

Point I.

In order to protect the public safety and welfare and prevent fraud upon the public, it is essential that the business of acting as agent or broker for the sale of transportation of persons by means of private passenger motor vehicles operated casually by unlicensed persons be regulated under the exercise of the police power.

The advent of good roads, coupled with the popularity of transportation over long distances by motor vehicle, has given rise to a new occupation, that of soliciting and arranging for the transportation of persons by means of private motor vehicles owned by individuals who operate

as carriers of passengers, not as a business but more or less casually and apparently only incidentally to some other occupation, and in many instances, as in the case at bar (R. 5), in order to minimize expenses in making a trip to some distant city. The owners or operators of these private passenger vehicles are without supervision of any kind such as is usually exercised over common carriers or private carriers *engaged in the business* of transporting persons or property. Due to the public's extensive patronage of this new mode of transportation a condition has been created which is highly detrimental to the public safety and general welfare, and this condition is one which directly affects a large portion of the traveling public. This condition, so inimical to the public welfare, results from the fact that the owners or operators of the vehicles are often, if not usually, financially irresponsible and their vehicles unsafe. Far too often persons pay for transportation to destinations to which the owners of these vehicles have no intention of transporting them. Passengers are left stranded along the route, either because of mechanical failure of the vehicle and lack of funds on the part of the owner to have repairs made, or by reason of outright fraud on his part. This loss falls upon a class of people who can ill afford to bear it. They seek this means of travel because of its economy. When these unfortunate people suffer loss or accident they have no practical means of recourse against the driver of the car for he is either without financial responsibility or has disappeared. While the operators of these vehicles may come and go, the broker or transportation agent who has brought the operator and the passenger together is conducting a permanent business at a fixed location and may readily be found. In other words, the broker is the only one who affords a practical means of relief to passengers who have suffered loss or accident.

Accordingly, in several of the States besides California

laws have been enacted for the protection of the public by requiring those in the business of securing passengers for private individuals to transport by means of motor vehicle to secure a license from the State upon payment of a more or less nominal fee and to post a bond in a substantial sum conditioned upon the faithful performance of the contract of carriage which has been entered into through their efforts.

It is respectfully submitted that legislation of this type is reasonable and necessary for the protection of the public and is a proper subject for the valid exercise of the police power.

The question then arises whether this particular power is to be exercised exclusively by the Federal government in its relation to the subject of interstate commerce and its effect thereon.

Point II.

The decision of the court below, holding that even in the absence of legislation by Congress upon the subject the States are without power to regulate motor carrier agents or brokers in so far as their acts relate to selling or arranging for transportation to destinations beyond the State, is in conflict with decisions of this Court applicable to the regulation of transportation and other acts in interstate commerce carried on by means of motor vehicles.

There seems to be no serious contention that the several States have not the power to enact this type of legislation with reference to intrastate operations.

People v. *Henry*, 131 Cal. App. 82, 95, 21 Pac. (2d) 672, 677;

People v. *Stelling*, 131 Cal. App. 300, 303, 21 Pac. (2d) 167, 168;

In re Marriott, 218 Cal. 179, 182, 22 Pac. (2d) 692, 694.

However, there is a division of judicial opinion upon the question of the power of the States to make such legislation applicable to interstate operations. Those courts which uphold the right of the States to regulate interstate operations by this type of legislation argue that it is not a direct burden upon interstate commerce and in support of their conclusion cite the decisions of this court in *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 77 L. Ed. 1053, and *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155, which were rendered subsequent to the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524, decided by this Honorable Court in 1927.

In the following cases it is held that the States may regulate the business of motor carrier brokers or transportation agents, even as to transactions in interstate commerce:

Francis v. *Allen* (1939), 54 Ariz. 377, 386, 96 Pac. (2d) 277, 281;

Bowen v. *Hannah* (1934), 167 Tenn. 451, 463, 71 S. W. (2d) 672, 676;

Martin v. *Railroad Commission* (1936, Tex. Civ. App.), 93 S. W. (2d) 1155, 1157, 1159.

Decisions to the contrary, in addition to the case at bar in the court below, are:

Ex Parte Talkington (1937), 132 Tex. Cr. R. 361, 104 S. W. (2d) 495;

Ex Parte Martin (1934), 127 Tex. Cr. R. 25, 74 S. W. (2d) 1017.

1. *Di Santo* v. *Pennsylvania* *Distinguished*

In *Di Santo* v. *Pennsylvania* (*supra*), 273 U. S. 34, 71 L. Ed. 524, this Honorable Court held that a State statute

which required steamship agents to secure a license and post a faithful performance bond with the State officials was void in so far as it applied to foreign commerce because of the fact that it constituted a direct burden upon such commerce.

Consideration of that case discloses that the Pennsylvania statute already provided for some procedure for the issuance of certificates of authorization for steamship agents to act and that the statute under attack was administered by the banking commissioner and apparently was aimed at some evil arising out of acts in the nature of the banking business carried on by steamship agents. The agent in the *Di Santo* case does not appear to have been acting as a broker for whoever had transportation to offer, but was the authorized representative of four steamship companies. It does not appear that he sold transportation for any other company. He was in every sense of the word a direct agent of the four companies which he represented, and was not an intermediary through which any person having casual transportation to sell might contact persons wishing to make a trip. This is a distinction recognized by the Interstate Commerce Commission. (*Cain Broker Application* (1937), 2 M. C. C. 633, 635.)

The motor carrier transportation agent conducting what amounts to a brokerage business is not to be compared with the steamship agent in the *Di Santo* case. The motor carrier transportation agent is more like a real estate broker or a stock broker who acts as an intermediary between persons desiring to sell and persons willing to buy.

Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Stone dissented from the opinion of the majority of the Court in the *Di Santo* case, which was delivered by Mr. Justice Butler. In Mr. Justice Brandeis' dissenting opinion, concurred in by Mr. Justice Holmes, it was pointed out that the Pennsylvania statute was a police measure

enacted for the evident purpose of preventing a species of fraud found to be practiced in that State. That the statute, though it related to the sale of steamship tickets, regulated an intrastate transaction, and that it did not obstruct or discriminate against foreign commerce nor place any *direct* burden upon such commerce but only affecte it indirectly.

In a separate dissenting opinion, also concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, Mr. Justice Stone pointed out that the purpose of the commerce clause of the Constitution was not to preclude all State regulation of commerce crossing State lines but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign, and that the recognition of the power of the States to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to State regulation, and which, because of their local character as well as their number and diversity, can never be adequately dealt with by Congress, and that such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the States by the decisions of this Honorable Court.

Mr. Justice Stone also stated in his dissenting opinion that to his mind the traditional test of the limit of State action by inquiring whether its interference with commerce is direct or indirect is too mechanical, too uncertain in its application, and too remote from actualities to be of value; that interference with interstate commerce by State regulation is to be sustained not because the effect on commerce is nominally indirect but because a consideration of all of the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce lead to the conclusion that the regulation concerns interests

peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across State lines.

It is respectfully submitted that the principles enunciated in the dissenting opinions in the *Di Santo* case have been adopted and approved by this Honorable Court in its subsequent decisions, commencing with *Continental Baking Co.* v. *Woodring* (*supra*), 286 U. S. 352, 76 L. Ed. 1155.

2. *Decisions Subsequent to Di Santo* v. *Pennsylvania.*

a. *Continental Baking Co.* v. *Woodring.*

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 76 L. Ed. 1155, this Court held that the States had the right to enact statutes requiring motor carriers, as a condition of obtaining a license to operate upon the highways of the State, to file a liability insurance policy in a reasonable sum as may be deemed adequate to protect the interests of the public against loss or damage to property resulting from the negligent operation of the motor carrier, on the ground that reasonable regulations to that end are valid as to intrastate traffic and where there is no discrimination against the interstate commerce which may be affected they do not impose an unconstitutional burden upon that commerce.

b. *Bradley* v. *Public Utilities Commission.*

In *Bradley* v. *Public Utilities Commission* (*supra*), 289 U. S. 92, 77 L. Ed. 1053, this Court upheld the right of the States to regulate the routes over which motor carriers might travel even though they be engaged in the interstate transportation of property. It was pointed out in the opinion delivered by Mr. Justice Brandeis that protection against accident, as against crime, presents ordinarily a local problem; that regulation to insure safety is an exercise of the police power, and that in the absence of action by Congress on the subject the States are free to legislate in that regard, even though motor cars used exclusively in interstate commerce are affected thereby.

c. *H. P. Welch Co.* v. *New Hampshire.*

In *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79, 83 L. Ed. 500, this Court upheld the validity of a State statute which prohibited the operation of motor vehicles engaged in the transportation of property when the driver has been continuously on duty for more than twelve hours or has not had a rest of eight consecutive hours between twelve-hour shifts, and held such statute applicable to motor vehicles operated in interstate transportation.

In the opinion delivered by Mr. Justice Butler, it was pointed out that, in view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any State safety measure prior to taking effect of a Federal measure found suitable to put in its place, and that the purpose of a Federal statute to displace the local law must be definitely expressed, and that Congress in enacting the Federal Motor Carrier Act of 1935 did not intend in its grant of power to the Interstate Commerce Commission to supersede State police regulations established for the protection of the public using State highways.

d. *Eichholz* v. *Public Service Commission.*

In *Eichholz* v. *Public Service Commission,* 306 U. S. 268, 83 L. Ed. 641, it was held that the State of Missouri had the right to require all freight motor carriers to secure certificates of public convenience and necessity for the reason that while Congress could regulate interstate transportation of the sort involved in that case, yet in the absence of the exercise of Federal authority and in the light of local exigencies the State is free to act in order to protect its legitimate interests, even though interstate commerce is *directly* affected.

e. *Ziffrin* v. *Reeves.*

In *Ziffrin* v. *Reeves,* 308 U. S. 132, 84 L. Ed. 128, this Court upheld a Kentucky statute regulating and prohibiting, except in a certain manner, the transportation of intoxicating liquor, and ruled that such statute is validly applicable to transportation by motor carrier beyond the limits of the State.

f. *Maurer* v. *Hamilton.*

In *Maurer* v. *Hamilton,* 309 U. S. 598, 84 L. Ed. 969, this Court, in an opinion delivered by Mr. Justice Stone, upheld the validity of a Pennsylvania statute, as applied to interstate transportation, which prohibited the operation of motor vehicles carrying any other vehicle above the cab of the carrier vehicle, it being pointed out that the subject-matter was not covered by the Motor Carrier Act of 1935 and that as a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not in general to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose, and that this is especially the case when public safety and health are concerned.

g. *Hartford Accident and Indemnity Company* v. *Illinois.*

Attention is respectfully called to the case of *Hartford Accident and Indemnity Co.* v. *Illinois,* 298 U. S. 155, 80 L. Ed. 1099. That case, while not directly involving the transportation of persons or property by motor carrier, yet involved a question identical in principle with that presented in the case at bar. In that case an Illinois statute required produce commission merchants to give faithful performance bonds for the protection of consignors and to secure a license upon application disclosing the fitness of such persons to engage in the business. This Court held that the statute does not, as applied to commission mer-

chants handling produce shipped to them from points outside the State, unconstitutionally burden interstate commerce. In upholding the validity of the statute, it was pointed out, in the opinion of the Court delivered by Mr. Justice Roberts, that the statute is a police regulation, that the business regulated is local, having its *situs* within the State and being conducted therein, and the fact that the commission merchant handles farm products shipped to him from points without the State is not enough to condemn the regulation of a business carried on within the borders of the State, as whatever effect the regulation has upon interstate commerce is indirect and incidental and within the regulatory power of the State until Congress, under the commerce power, adopts inconsistent legislation.

It is respectfully submitted that a consideration of the foregoing decisions of this Honorable Court leads clearly to the conclusion that under the principles enunciated therein the statute involved in the case at bar is a valid exercise of the police power of the State of California, even as applied to respondent's acts in arranging for transportation to points outside the State.

Point III.

The Motor Carrier Act of 1935 (Chap. 8, Interstate Commerce Act, Title 49, U. S. C. A., §§ 301-327) excludes from its operation the casual, occasional or reciprocal transportation of passengers in interstate commerce, for compensation, by any person not engaged in transportation by motor vehicle as a regular occupation or business.

Chapter 8 of the Interstate Commerce Act, Title 49, U. S. C. A., sections 301 to 327, referred to as the Motor Carrier Act of 1935, expressly declares, in section 303(b), that:

> "* * * unless and to the extent that the commission shall from time to time find that such application is

necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: * * * (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

While it appears that the Interstate Commerce Commission is given authority to act in the matter of casual, occasional or reciprocal transportation to the extent that the Commission may find necessary in order to carry out the policy of Congress enunciated in section 302 of the Motor Carrier Act, the Interstate Commerce Commission has not as yet assumed to act in the matter and has repeatedly held that brokers acting as intermediaries for persons desiring to furnish casual and occasional motor carrier transportation are not required to be licensed by the Commission, as evidenced by the following decisions of the Commission:

Hale Broker Application (1939), 14 M. C. C. 451, 453;
Michaux Broker Application (1939), 11 M. C. C. 317, 318;
Frank Broker Application (1938), 8 M. C. C. 15, 19.

From the express language of the Motor Carrier Act of 1935 it is apparent that Congress did not command the Interstate Commerce Commission to exercise authority over the type of motor carrier for which respondent acted as intermediary in the sale of transportation by means of such vehicles, except in the matter of the qualifications and maximum hours of service of employees and safety of operation or standards of equipment, and even as to those matters it apparently was not the intent of Congress to

withdraw from the States all legislative power in that regard. (*Maurer* v. *Hamilton* (*supra*), 309 U. S. 598, 84 L. Ed. 969.)

It is therefore respectfully submitted that Congress has not attempted to regulate the casual, occasional or reciprocal transportation of persons by private motor vehicle where the operators thereof are not engaged in such transportation as a business, but at most has left the matter to the discretion of the Interstate Commerce Commission, which body has to date declined to act in the matter, and that therefore whatever regulation such carriers and the brokers acting for them may be subjected to is that found in the regulatory statutes of the several States. (*H. P. Welch Co.* v. *New Hampshire* (*supra*), 306 U. S. 79, 85, 83 L. Ed. 500, 505.)

Point IV.

It is of utmost importance that this honorable Court render its decision upon the question of the right of the States to regulate motor carrier agents or brokers in the absence of action upon the part of Congress, as the existing conflict in the decisions of the courts of the various States upon this question seriously hampers effective regulation of this business, which is so badly needed for the protection of the public.

From what has been said with regard to the evil with which the public is confronted, coupled with the conflict of decision in the State courts upon the question of the power of the States to legislate on the matter, and the refusal of the Interstate Commerce Commission to act based upon its interpretation of the Motor Carrier Act of 1935, it is apparent that it is of utmost importance that this Honorable Court grant the petition for a writ of certiorari in the case at bar in order that a decision may be rendered by the

highest court in the land finally and authoritatively determining the question and thereby eliminate the present uncertainty as to whether power resides in the States to legislate upon the subject of private individuals rendering casual transportation in their private passenger vehicles between points in different States, and the business of those who act as intermediaries or brokers in obtaining passengers for such persons.

Conclusion.

In conclusion, it is respectfully submitted that in this case a writ of certiorari should be granted in order that this Court may review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, and reverse such judgment.

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SUPREME COURT OF THE UNITED STATES.

No. 687.—October Term, 1940.

The People of the State of California, Petitioner, vs. E. W. Thompson.	On Writ of Certiorari to the Appellate Department of the Superior Court, Los Angeles County, State of California.

[April 28, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

A statute of California, Ch. 390, Statutes of 1923, p. 1011, as amended by Ch. 665, Statutes of 1935, p. 1833, defines a transportation agent as one who "sells or offers to sell or negotiate for" transportation over the public highways of the state, § 2, and requires every such agent to procure a license from the State Railroad Commission authorizing him so to act. By §§ 6, 7 and 8, prerequisites to the license are determination by the Commission of the applicant's fitness to exercise the licensed privilege, the payment of a license fee of $1.00, and the filing by the applicant of a bond in the sum of $1,000, conditioned upon the faithful performance of the transportation contracts which he negotiates. By § 16 any person acting as a transportation agent without a license is guilty of a misdemeanor. The question for decision is whether the statutory exaction of the license and bond infringes the Commerce Clause of the Constitution when applied to one who negotiates for the transportation interstate of passengers over the public highways of the state.

Respondent was convicted of violation of the statute by arranging for the transportation by motor vehicle, of passengers from Los Angeles, California, to Dallas, Texas, by one who, so far as appears, made only the single trip in question. The state appellate court reversed the judgment of conviction, holding on the authority of *DiSanto* v. *Pennsylvania*, 273 U. S. 34, that the statute as applied infringes the Commerce Clause. We granted certiorari February 17, 1941, the question, considered in the light

of our decisions since the *DiSanto* case, sustaining state regulations affecting interstate transportation by motor vehicle, being of importance.

Congress has not undertaken to regulate the acts for which respondent was convicted or the interstate transportation to which they related. The Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301-327, which applies to certain classes of common and contract interstate carriers by motor vehicle, excludes from its operation the casual or occasional transportation by motor vehicle of passengers in interstate commerce by persons not engaged in such transportation as a regular occupation or business, § 303(b)(9). Hence we are concerned here only with the constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power.

The statute is not a revenue measure. Cf. *Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150. It applies alike to transportation agents who negotiate for transportation intrastate as well as interstate and so does not discriminate against interstate commerce. Cf. *Real Silk Mills* v. *Portland*, 268 U. S. 325. It does not appear that the regulation will operate to increase the cost of the transportation or in respects not already indicated affect interstate commerce. It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses.

As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local

character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *DiSanto* v. *Pennsylvania, supra,* 40.

A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama,* 124 U. S. 465; *Chattanooga & St. Louis Railroad* v. *Alabama,* 128 U. S. 96. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453; *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams,* 233 U. S. 685. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, New Haven & Hartford R. R. Co.* v. *New York,* 165 U. S. 628. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch,* 177 U. S. 584. It may require an interstate railroad to eliminate grade crossings. *Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 409, 412. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, etc. S. S. Co.* v. *Louisiana,* 118 U S. 455; *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Blackbird Creek Marsh Co., supra; see Clyde Mallory Lines,* 296 U. S. 261, 267. It may regulate pilots and pilotage in its harbors. *Cooley* v. *Board of Port Wardens, supra.* Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations applicable to articles of interstate commerce designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner* v. *Maryland,* 107 U. S. 38; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Patapsco*

Guana Co. v. *North Carolina,* 171 U. S. 345, 357, 358; *Savage* v. *Jones,* 225 U. S. 501; see also *Minnesota Rate Cases,* 230 U. S. 352, 398-412 and cases cited; *South Carolina Highway Dept.* v. *Barnwell Bros,* 303 U. S. 177, 185-191 and cases cited.

The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. Cf. *Crutcher* v. *Kentucky,* 141 U. S. 47; *Walker Co.* v. *Bondurant,* 257 U. S. 282. For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restriction of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers.

Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated. In any case until Congress undertakes its regulation we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority.

In *DiSanto* v. *Pennsylvania,* this Court took a different view. Following what it conceived to be the reasoning of *McCall* v. *California,* 136 U. S. 104, it held that a Pennsylvania statute requiring others than railroad or steamship companies, who engage in the intrastate sale of steamship tickets or of orders for transportation to and from foreign countries, to procure a license by giving proof of good moral character and filing a bond as security against fraud and misrepresentation to purchasers, was an infringement of the Commerce Clause. Since the decision in that case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and con-